Supreme Court, U.S.
FILED

01-381 AUG 29 2001

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No. _____

In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GREAT NORTHERN PAPER, INC.; GEORGIA-PACIFIC CORPORATION; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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152 pp

QUESTIONS PRESENTED FOR REVIEW

Are the terms and conditions under which the non-Indian public, including corporations which have long been hostile to the Petitioner Tribes, can gain and enforce entry into the Tribes' reservations to demand, inspect, and copy tribal records "internal tribal matters" reserved, under federal law, to the Tribes' exclusive control and immune from state jurisdiction?

Did the Maine Supreme Judicial Court err in deciding, in conflict with the decisions of the First Circuit, not to measure the Petitioner Tribes' right to be free from state control over the non-Indian public's intrusion into the reservations to demand, inspect, and copy tribal records in accordance with federal common law principles of inherent tribal sovereignty?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION ENTERED IN THE CASE 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

I. The Penobscot Nation and the Passamaquoddy Tribe 2

II. The Maine Indian Claims Settlement Act of 1980, the Controversy at Issue, and the Historical Backdrop: Tribal Sovereignty and State Power in Maine 4

A. Tribal Sovereignty and State Relations in Maine Before the Settlement Act 6

B. The Language in Controversy, and Contrasting Federal and State Court Interpretations 7

III. Respondents' Action, the Federal Questions Presented, Their Disposition by the State Courts, and the Tribes' Related Federal Action 10

A. The Corporations' Access Demands, and Parallel Federal and State Court Proceedings 10

B. The Maine Superior Court's Decision 15

TABLE OF CONTENTS – Continued

Page

C. The Maine Superior Court's Final Judgment, Contempt Proceedings, and the Tribes' Appeal to the Maine Supreme Judicial Court 16

D. Arguments Presented and their Disposition by the Maine Supreme Judicial Court 17

E. The First Circuit's Decision and the Petitioners' Pending Stay Motion 20

REASONS FOR ALLOWANCE OF THE WRIT 21

I. The Court Should Grant the Writ Because the Decision of the Maine Supreme Judicial Court Raises Federal Questions of Fundamental Importance 21

II. The Court Should Grant the Writ to Resolve the Conflicting Views of the Maine Supreme Judicial Court and the First Circuit Regarding Petitioners' Proper Status as Tribes 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997) 9, 27, 28

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983) 23, 25

Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1978) 6, 7, 8, 27, 28

County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) 9

Department of Interior v. Klamath Water Users, 533 U.S. ___, 121 S. Ct. 1060 (2001) 24, 30

Great Northern Paper, Inc. v. Penobscot Nation, 770 A.2d 574 (Me. 2001) 1

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 25

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) 26

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 22

Murch v. Tomer, 21 Me. 535 (1842) 6, 8, 19, 25, 26

Nevada v. Hicks, 533 U.S. ___, 121 S. Ct. 2304 (2001) 22, 24, 30

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 21

Oliphant v. Schlie, 544 F.2d 1077 (9th Cir. 1976) 22

Penobscot Nation v. Georgia-Pacific Corp., 106 F. Supp. 2d 81 (D.Me. 2000) 15

TABLE OF AUTHORITIES – Continued

Page

Penobscot Nation v. Georgia-Pacific Corp., 254 F.3d 317 (1st Cir. 2001) 20

Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999) ... 7, 8, 9, 26, 27, 28

Penobscot Nation v. Stilphen, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 963 (1983) 9, 13, 17, 19, 26

State v. Dana, 404 A.2d 551 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980) 7, 8, 27, 28

State v. Newell, 84 Me. 465 (1892) 6, 9, 25, 26

United States v. Maine, Civil Nos. 1966-ND and 1969-ND (D. Me.) 4

United States v. Mazurie, 419 U.S. 544 (1975) 22

United States v. Wheeler, 435 U.S. 313 (1978) 7

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 9

Williams v. Lee, 358 U.S. 217 (1959) 21, 23

Worcester v. Georgia, 6 Pet. 515 (1832) 21

STATUTES

5 U.S.C. § 552 24

25 U.S.C. § 1721(i) 3

25 U.S.C. § 1721(a)(1) 1, 4

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. § 1721(a)(7) 1, 4, 8
25 U.S.C. § 1722(e) 4
25 U.S.C. § 1722(f) 2
25 U.S.C. § 1722(h) 2, 3
25 U.S.C. § 1722(i) 2
25 U.S.C. § 1722(k) 2, 3
25 U.S.C. § 1724(a) 4
25 U.S.C. § 1724(b) 4
25 U.S.C. § 1724(c) 4
25 U.S.C. § 1724(d) 4
25 U.S.C. § 1724(e) 4
25 U.S.C. § 1725(b)(1) 1, 4, 8
25 U.S.C. § 1731 ..... 1, 4, 8
25 U.S.C. § 1735(a) 1
28 U.S.C. § 1257(a) 1
1 M.R.S.A. § 401 ..... 10, 23
1 M.R.S.A. § 402(3) 11, 23
1 M.R.S.A. § 408 ..... 10, 11, 16, 23
1 M.R.S.A. § 409(1) 11
30 M.R.S.A. § 6202 4
30 M.R.S.A. § 6203(5) 2, 3
30 M.R.S.A. § 6206(1) 1, 8, 10

TABLE OF AUTHORITIES – Continued

Page

30 M.R.S.A. § 6203(7) 2, 3

30 M.R.S.A. § 6203(8) 3

30 M.R.S.A. § 6203(10) (West 1989) 3

CONSTITUTIONS

U.S. CONST. art. I, § 8, cl.3 1

LEGISLATIVE HISTORY

S. REP. NO. 96-957 (1980) 3, 6, 7, 28

H.R. REP. NO. 96-1353 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786 ..... 3, 6, 7

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Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 25 J. SUP. CT. HIST. 215 (2001) 21

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F. KIDDER, MILITARY OPERATIONS IN EASTERN MAINE AND NOVO SCOTIA DURING THE REVOLUTION (1867) 3

O'Toole and Tureen, *State Power and the Passamaquoddy Tribe*, 23 ME. L. REV. 1 (1971) 3

Federal Register Notices:

44 Fed. Reg. 7235, 7236 (1979) 7

65 Fed. Reg. 39,899-00 (2000) 5

65 Fed. Reg. 47,989-990 (2000) 5

TABLE OF AUTHORITIES – Continued

Page

State Session Laws:

1979 Me. Laws, ch. 732, § 31 ..... 1, 4, 8

Rules:

SUP. CT. R. 14(1)(g)(i) 14

Newspapers:

Jim Adams, *Eastern Tribes Rally Behind Maine Nations*, INDIAN COUNTRY TODAY, March 7, 2001 at B1 2

Murray Carpenter, *Tribal Leaders Appeal Ruling in Maine Case*, BOSTON GLOBE, Nov. 15, 2000 at B3 2

Pamela Ferdinand, *Maine Court Raises the Stakes in Fight Over Tribal Rights: Indian Leaders Ordered Jailed for Contempt*, WASH. POST, Nov. 11, 2000 at A3 2

Bart Jansen, *Tribal Rift with State Intensifies*, ME. SUN. TELEG., May 6, 2001 at 1A 2

OPINION ENTERED IN THE CASE

Great Northern Paper, Inc. v. Penobscot Nation, 770 A.2d 574 (Me. 2001).

STATEMENT OF JURISDICTION

On May 1, 2001, the Maine Supreme Judicial Court, entered judgment in *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574. Petitioners timely filed a motion for reconsideration on May 15, 2001, and on May 31, 2001, that court denied the motion. This Court has jurisdiction to review the Maine Supreme Judicial Court's judgment pursuant to 28 U.S.C. § 1257(a) (1994) in that Petitioners have, throughout the proceedings below, claimed immunity from the state authority imposed by that judgment pursuant to the Constitution, statutes, and laws of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. art. I, § 8, cl. 3; 25 U.S.C. §§ 1721(a)(1), 1721(a)(7), 1725(b)(1), 1731, 1735(a) (1994); Me. Rev. Stat. Ann. tit. 30 (hereinafter "30 M.R.S.A.") § 6206(1) (West 1996); 1979 Me. Laws, ch. 732, § 31. These provisions are set out in the Appendix ("App.") at 37-41.

STATEMENT OF THE CASE

This Petition presents questions of fundamental importance to two federally recognized Indian tribes in Maine. The Maine Supreme Judicial Court has mandated the entry of hostile corporations onto Petitioners' reservations and stripped Petitioners of their governmental prerogative to decide if, and under what terms, the non-

Indian public should have access to tribal property located on those reservations. It has done this by deeming Congress' settlement of Petitioners' land claims to have relegated Petitioners to the mere status of municipal governments. In so doing, the Maine Supreme Judicial Court has placed itself in direct conflict with the First Circuit, which holds to the view that Petitioners retain attributes of inherent sovereignty as do other Indian tribes, attributes which certainly include the power to prevent undesirable outsiders from entering tribal lands at will and the power to set policy regarding public access to tribal records inside the reservations.

The issues here strike to the core of Petitioners' existence *qua* tribes and have sparked enormous controversy.[1] Tribal leaders have suffered arrest for contempt to preserve the Tribes' rights and identities against intrusions ordered by the state court. Petitioners ask this Court to grant the writ to address issues at the heart of tribal-state relations in Maine and to reconcile the conflicting views of the Maine Supreme Judicial Court and the First Circuit regarding the very political identity of the Tribes.

I. The Penobscot Nation and the Passamaquoddy Tribe

Petitioners, the Penobscot Nation and the Passamaquoddy Tribe (the "Tribes"), are federally recognized Indian tribes with reservations in Maine. 25 U.S.C. §§ 1722(f), (h), (i), (k) (1994); 30 M.R.S.A. §§ 6203(5), (7),

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[1] *See, e.g.*, Pamela Ferdinand, *Maine Court Raises the Stakes in Fight Over Tribal Rights: Indian Leaders Ordered Jailed for Contempt*, WASH. POST, Nov. 11, 2000 at A3; Bart Jansen, *Tribal Rift With State Intensifies*, ME. SUN. TELEG., May 6, 2001 at 1A; Murray Carpenter, *Tribal Leaders Appeal Ruling in Maine Case*, BOSTON GLOBE, Nov. 15, 2000 at B3; Jim Adams, *Eastern Tribes Rally Behind Maine Nations*, INDIAN COUNTRY TODAY, March 7, 2001.

(8), (10) (West 1996). They are riverine peoples, historically dependent upon sustenance fishing and other river resources within their respective aboriginal territories, which are the watersheds of the Penobscot River and the St. Croix River. *See* S. REP. NO. 96-957, at 11 (1980); H.R. REP. NO. 96-1353, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787.

The Penobscot Nation is governed by the Penobscot Nation Governor (or Chief) and Council. 25 U.S.C. § 1722(k). Its reservation encompasses islands within the Penobscot River, including Indian Island (near Old Town, Maine). 25 U.S.C. § 1721(i); 30 M.R.S.A. § 6203(8). The Passamaquoddy Tribe is governed by the Joint Tribal Council of the Passamaquoddy Tribe, with separate Governors and Councils at each of the tribe's two reservations, which are located in the most eastern reaches of this country, Indian Township reservation (near Princeton, Maine) and Pleasant Point reservation (near Perry, Maine). 25 U.S.C. § 1722(h); 30 M.R.S.A. §§ 6203(5), (7). "First contacted . . . by the earliest explorers of the North American continent," the Tribes assisted General George Washington in ousting the British from eastern Maine during the War of Independence in exchange for assurances of federal protection. S. REP. NO. 96-957, at 11; H.R. REP. NO. 96-1353, at 11-12, *reprinted in*, 1980 U.S.C.C.A.N. at 3787.[2]

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[2] In 1777, upon negotiating a treaty with the Passamaquoddy Tribe, Colonel John Allan, director of the federal grovernment's Eastern Indian Outpost, assured the tribe that "they should be forever viewed as brothers and children under the Protection and Fatherly care of the United States and enjoy every right and privilege. . . . " F. KIDDER, MILITARY OPERATIONS IN EASTERN MAINE AND NOVA SCOTIA DURING THE REVOLUTION, 311 (1867), *cited and quoted in*, O'Toole and Tureen, *State Power and the Passamaquoddy Tribe*, 23 ME. L. REV. 1, 8-9 (1971).

II. The Maine Indian Claims Settlement Act of 1980, the Controversy at Issue, and the Historical Backdrop: Tribal Sovereignty and State Power in Maine

On October 10, 1980, Congress enacted the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1994) (the "Settlement Act"). The Settlement Act ended *United States v. Maine*, Civil Nos. 1966-ND and 1969-ND (D. Me.), actions brought by the United States on Tribes' behalf to recover 60 percent of the landmass in Maine given up by the Tribes to Massachusetts and Maine in violation of the Indian Trade and Intercourse Act of 1790 (the "land claims litigation"). *See* 25 U.S.C. §§ 1721(a)(1), 1721(a)(7), 1731; 30 M.R.S.A. § 6202. The Settlement Act also confirmed, and rendered effective, Maine's Act to Implement the Indian Claims Settlement, 30 M.R.S.A. §§ 6201-6214 (West 1996 & Supp. 2000) (the "Maine Implementing Act"), *see* 25 U.S.C. §§ 1722(e); 1725(b)(1); 1979 Me. Laws ch. 732, § 31, which, in turn, "implement[ed] in part" an agreement between the Tribes and the State of Maine to resolve disputes "over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations." 30 M.R.S.A. § 6202.[3]

The case at bar arises out of efforts by three corporations, Respondents Great Northern Paper, Inc., Georgia-Pacific Corporation, and International Paper Company

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[3] Although Congress compromised the Tribes' land claims against the State of Maine with the Settlement Act, 25 U.S.C. §§ 1721(a)(7), 1731, the State made no monetary contribution to the land acquisition or other restricted trust funds established by Congress for the Tribes pursuant to the Settlement Act. *See* 25 U.S.C. §§ 1724(a)-(e). The Tribes make note of this in order to correct the misimpression, created by the opinions below, that the Tribes relinquished aspects of their inherent authority in exchange for payment by the State.

(the "corporations"), which discharge waste effluent from paper manufacturing into river waters within or near the reservations of the Tribes, to enter tribal offices inside the Tribes' reservations to obtain tribal records concerning efforts by the Tribes to protect water quality and river resources.[4] The corporations claim – and the Maine courts have agreed – that they may, on demand, enter the reservations to gather tribal records pursuant to a state law governing public access to state agencies and political subdivisions, and that they may enforce their "public access rights" against the Tribes in any county court of the State.

This case raises fundamental questions of federal law concerning the jurisdictional power of Maine over the Tribes and the Tribes' inherent self-governing authority (or sovereignty). An understanding of the Tribes' inherent sovereignty at the time of the Settlement Act, and the split views of the First Circuit and the Maine Supreme Judicial Court on this subject after the Act, is critical to an understanding of this Petition. The Tribes, therefore, initially describe this important historical context.

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[4] The corporations have been, and continue to be, significant adversaries of the Tribes in sensitive environmental matters, including, most recently, an administrative proceeding before the Environmental Protection Agency, in which the State of Maine has applied, under the Clean Water Act, to take over the federal program for permitting waste water discharges into waters within or near the Tribes' reservations. *See, e.g.*, 65 Fed. Reg. 47,989-990 (2000); 65 Fed. Reg. 39,899-00 (2000).

A. Tribal Sovereignty and State Relations in Maine Before the Settlement Act

Prior to the land claims litigation, the State of Maine held to the view that unlike "the fierce warring tribes of the frontier," the Penobscot Nation and the Passamaquoddy Tribe had no inherent sovereignty because their historic domination by Maine had, over time, destroyed it. *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064 (1st Cir. 1978). *See* S. REP. NO. 96-957, at 14; H.R. REP. NO. 96-1353, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 3790. This view was rooted in a decision of the Maine Supreme Judicial Court (hereinafter the "Maine Supreme Court") issued not long after Maine's statehood in 1820. In *Murch v. Tomer*, 21 Me. 535 (1842), the court announced that "[i]mbecility on their [the Indians'] part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man." *Id.* at 538. In *State v. Newell*, 84 Me. 465 (1892), the court, following *Murch*, said, "Though these Indians . . . perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. . . . They are as completely subject to the State as any other inhabitants can be." *Id.* at 468.

In its 1979 landmark decision, *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, the First Circuit emphatically rejected the state court's view. *See* S. REP. NO. 96-957, at 14; H.R. REP. NO. 96-1353, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 3790. In a unanimous opinion written by then Chief Judge Frank M. Coffin, the First Circuit held that the Passamaquoddy Tribe, like other Indian tribes, retained its sovereign immunity from suit as an attribute of its "inherent" sovereignty. *Bottomly*, 599 F.2d at 1066.

Rejecting Maine's view as "fundamentally misconceive[d]," the *Bottomly* Court made clear that "[t]he powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never extinguished.'* F. Cohen, Handbook of Federal Indian Law 122 (1945) . . . [and] until Congress acts, the tribes retain their existing sovereign powers." *Id.* at 1065-66 (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)) (emphasis in original).

The State's view that the Tribes lacked inherent governmental authority like other Indian tribes was further undermined in 1979 when the United States Department of the Interior formally recognized each as having a "government-to-government relationship with the United States." 44 Fed. Reg. 7235, 7236 (1979); *see State v. Dana*, 404 A.2d 551, 563 (Me. 1979) (citing same), *cert. denied*, 444 U.S. 1098 (1980). And the final blow came later that same year when the Maine Supreme Court issued its own landmark decision in *State v. Dana*, 404 A.2d 551. As described by Congress' identical final committee reports on the Settlement Act, the Maine Supreme Court, in *Dana*, "reversed its earlier decisions and adopted the same view" as the First Circuit in *Bottomly*: *"that the Maine Tribes still posses inherent sovereignty to the same extent as other tribes in the United States."* S. REP. NO. 96-957 at 14 (emphasis added); H.R. REP. NO. 96-1353 at 14, *reprinted in* 1980 U.S.C.C.A.N. at 3790 (emphasis added).

B. The Language in Controversy, and Contrasting Federal and State Court Interpretations

In 1980, when Congress enacted the Settlement Act and ratified the critical phrase at issue in this Petition, it understood that the Tribes' "inherent sovereignty" had been confirmed in *Bottomly* and *Dana*. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir. 1999), *cert. denied*, 527

U.S. 1022. Intending "federal Indian common law [to] give meaning" to the phrase, Congress confirmed that the Tribes would have exclusive authority over *"internal tribal matters,"* free from any state interference. *Id.* The phrase, *"internal tribal matters,"* rendered effective only upon Congress' dismissal of the Tribes' land claims and ratification of the Maine Implementing Act, *see* 25 U.S.C. §§ 1721(a)(7), 1731, 1979 Me. Laws ch. 732, § 31, appears in that Act as a flat prohibition against state authority, with some examples:

> [T]he Passamaquoddy Tribe and the Penobscot Nation . . . shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that *internal tribal matters,* including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State.*

30 M.R.S.A. § 6206(1) (emphasis added), *ratified by* 25 U.S.C. § 1725(b)(1).

A fundamental conflict has developed between the First Circuit and the Maine Supreme Court in their interpretation of this language. The gulf between these courts' views of the Tribes, while previously bridged by *Dana,* is again as wide (and with consequences as far reaching for the Tribes) as that between *Murch* and *Bottomly.*

In 1999, the First Circuit, reaffirming *Bottomly,* made clear that in ratifying the protection against state regulation of "internal tribal matters," Congress intended to "preserve" attributes of "tribal sovereignty" in accordance with "prior legal understandings" of federal Indian common law established by this Court. *See Fellencer,* 164

F.3d at 708-09, 712. *See also Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997). "The meaning of [the] phrase," the First Circuit declared, "*raises a question of federal law*," *Fellencer* at 708 (emphasis added); for the provision was given legal effect only by virtue of Congress' compromise of the Tribes' land claims in the Settlement Act in the exercise of its constitutional plenary authority over Indian affairs. *See id.* at 708-09 (citing U.S. CONST., art. I, § 8, cl. 3). And in interpreting that meaning, the First Circuit held in no uncertain terms that the phrase must be construed "to comport with the traditional notions of sovereignty and the federal policy of encouraging tribal independence." *Id.* at 709 (citing and quoting *County of Oneida v. Oneida Indian Nation of New* York, 470 U.S. 226, 247 (1985) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

This was in sharp contrast with the views of the Maine Supreme Court. In 1983, that court held that the "internal tribal matters" phrase must be construed without regard to principles of federal Indian common law. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me.), *appeal dismissed*, 464 U.S. 963 (1983). It would be "rash," the *Stilphen* court said, to look to this Court's decisions addressing "tribal self-government" or "internal and social relations" to interpret its meaning. *Id.* Instead, the court held that because the phrase was found in a state statute, it must be construed under ordinary principles of statutory construction. *Id.* at 489-90. Focusing on statements of Maine's Attorney General and state legislators, the court said that the phrase likely protected only things "uniquely Indian in character" or "traditional Indian practice[s]." *Id.* at 490.

III. Respondents' Action, the Federal Questions Presented, Their Disposition by the State Courts, and the Tribes' Related Federal Action

A. The Corporations' Access Demands, and Parallel Federal and State Court Proceedings

By letters dated May 10, 2000 and served upon the Tribes, the corporations claimed a right, under the first clause of section 6206(1), to treat the Tribes as political subdivisions of the State of Maine and thereby to enter the Tribes' reservations, and their governmental offices within the reservations, to inspect and copy tribal records (including computer stored information) pursuant to Maine's Freedom of Access Act, 1 M.R.S.A. §§ 401-410 (West 1989 & Supp. 2000) (the "Maine Access Act" or "MAA"). Record Item 2 before the Maine Supreme Judicial Court, in *Great Northern Paper, Inc. v. Penobscot Nation*, Docket No. Cum-00-573, Exhibit ("Exh.") A.[5] The corporations' formal MAA demands stated:

> The [MAA] requires that public records be made available for public inspection. 1 M.R.S.A. § 408. . . . [P]ublic records include all records "in the possession or custody of an agency or public official of this State or any of its political subdivisions" that have "been received or prepared for use in communication with the transaction of public or governmental business or contains

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[5] Petitioners hereinafter refer to the Record items before the Maine Supreme Judicial Court as "R.No."

> information relating to the transaction of public or governmental business." *Id.* § 402(3).
>
> * * *
>
> Pursuant to the requirement of the [MAA], you are required to make the requested records available during regular business hours. 1 M.R.S.A. § 408.

R.No. 2, Exh. A.[6]

The Tribes responded that as Indian tribal governments, they governed "public access" to records within their reservations on their own terms and were not subject to state regulation of such matters under the MAA. R.No. 2, Exh. B. They offered, however, to provide the corporations with documents not privileged from disclosure under their own tribal rules or standard privileges, noting the fact the Tribes and the corporations were legal adversaries in matters concerning the corporations' use of waters affecting them. *Id.*; *see also supra*, note 4.

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[6] Section 408 of the Maine Access Act declares, in pertinent part, that "every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record." 1 M.R.S.A. § 408. "Public records" are defined, as "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of any agency or public official of this State or any of its political subdivisions. . . . *Id.* § 402(3) (West Supp. 2000). Section 409 provides for judicial review of the action of a state "body or agency or official" in responding to a given MAA access demand. *See* 1 M.R.S.A. § 409(1). "Any person aggrieved" by a denial of a request "may appeal therefrom" to "any Superior Court within the State," and the court is to give the matter priority for "trial." *Id.* If the court, after de novo review, "determines such denial was not for just and proper cause, it shall enter an order for disclosure." *Id.*

The controversy escalated without resolution. Threatened by the corporations' unyielding claim that the Tribes were subject to the MAA as "political subdivisions" of Maine and that corporate representatives, therefore, had a right under state law to enter the Tribes' reservations to inspect and copy the internal files of the Tribes, without regard to tribal rules or customs, the Tribes filed an action for declaratory and injunctive relief against the corporations in the United States District Court for the District of Maine on May 18, 2000. R.No. 17, Exh. A. The Tribes asserted that Congress had protected their right to govern "internal tribal matters" without state interference and that the public's access to tribal property (e.g., records and computer files) within their reservations was an "internal tribal matter." *Id.* They asked the district court to declare that they had a federally-protected right, confirmed by Congress under the Settlement Act, to be free from the MAA. And they asked the district court to enjoin the corporations from invoking that law against them. *Id.*, Exhs. A-B.

Four days later, on May 22, 2000, the corporations filed an action in the Maine Superior Court against the Petitioners for judicial review under the MAA, *see* 1 M.R.S.A. § 409(1), quoted *supra* note 6. R.No. 2. They claimed that the Tribes had refused them access to tribal records in violation of the MAA, and demanded an order requiring Petitioners "to permit the [corporations] to inspect and copy each and every document" set forth in their May 10, 2000 demands. R.No. 2 at 5.

The State of Maine intervened in both cases to support the corporations. *See* R.Nos. 21, 38. It claimed an interest in the corporations' MAA case because it involved interpretations of "the jurisdictional relationship between the state and the tribes." R.No. 21 at 2. In

the face of the Tribes' motions for a preliminary injunction and for summary judgment in the federal court, the corporations, supported by the State, initiated a race to judgment. *See, e.g.*, R.Nos. 11, 15. They immediately sought "partial summary judgment" in their MAA action, R.No. 11, and simultaneously moved to dismiss the Tribes' federal case. R.No. 27, Exh. A.[7]

In support of the MAA summary judgment motion, the corporations and the State argued that by virtue of the "municipal duties and obligations" clause of section 6206(1), the state court must presume, in the first instance, that the Tribes are fully subject to the MAA as if political subdivisions of the State. R.No. 11 at 7, 10; R.No. 38 at 16. Contrary to *Fellencer*, but consistent with *Stilphen*, they asserted that the "internal tribal matters" clause operated as a "narrow exception" to this presumed state authority, rather than confirmation of the Tribes' exclusive rights of self-government not otherwise expressly yielded in the settlement acts. R.No. 11 at 12; R.No. 38 at 11, 13. In terms of the MAA, they framed the "internal tribal matters" clause as providing a potential defense (i.e., "just cause") for declining inspection in the context of an otherwise fully applicable regulatory regime. *See* R.No. 11 at 1, 7, 9-10; R.No. 38 at 16, 19. So framed, they asserted that the "internal tribal matters" clause was effective, if at all, only if the *particular subject categories of documents* they demanded to inspect implicated the Tribes' "internal tribal matters." R.No. 11 at 7; R.No. 38 at 16.

The Petitioners (over vigorous objections by the corporations and the state) sought to stay the MAA case on

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[7] Dissatisfied with the Maine Superior Court's pace in reaching disposition on their MAA summary judgment motion, the corporations invoked MAA's trial priority provision, *see* 1 M.R.S.A. § 409(1), and threatened the court with mandamus. *See* R.No. 55 at 2-3.

the ground that the dispositive federal question – whether they were immune from state authority over matters of public access to their reservation records pursuant to the "internal tribal matters" provision – was before the federal court on their pending motions. *See* R.Nos. 17, 27, 28. Unable to secure a stay prior to the deadline for responding to the corporations' MAA summary judgment motion, on July 3, 2000, they filed a motion to dismiss the corporations' MAA case for lack of subject matter jurisdiction and failure to state a claim for relief. App. at 42-43. They argued that Congress, in exercising its constitutional plenary authority over Indian affairs to enact the Settlement Act and ratify the Maine Implementing Act, protected their inherent right to govern "internal tribal matters" without state interference in keeping with established principles of federal Indian law. App. at 45. Citing *Fellencer*, the Petitioners pointed out that the meaning of the phrase, "internal tribal matters" presented a question of federal law. App. at 45. Drawing upon *Fellencer*, the Petitioners argued that under the established precedents of this Court, the general public's "right" to inspect and copy tribal documents within their reservations was a matter within the exclusive inherent authority of the Tribes to govern and, therefore, an "internal tribal matter," free from any state control under the MAA, including the corporations' MAA enforcement action. App. at 46-48, 52-66. Thus, Petitioners presented the federal questions at issue in this Petition at the very outset of proceedings in the state court.[8]

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[8] The record material required by SUP. CT. R. 14(1)(g)(i), showing the method and manner in which Petitioners raised the federal questions presented herein to the Maine Superior Court and the Maine Supreme Judicial Court, and their disposition by those courts, are voluminous and, therefore, set forth in the Appendix. App. at 42-111.

On July 20, 2000, the district court dismissed the Tribes' federal action under the "well-pleaded complaint rule." *Penobscot Nation v. Georgia Pacific Corp.*, 106 F.Supp.2d 81 (D.Me. 2000). Applying that rule, the district court said,

> the Tribes' claim that federal law prevents the application to them of Maine's Freedom of Access Act. Perhaps they are correct (I express no view) but, if so, that is a matter to present to the courts of the State of Maine in defending against the paper companies' threatened lawsuit seeking to enforce the state law.

Id. at 83.

B. The Maine Superior Court's Decision

By Decision and Order dated September 19, 2000, the Maine Superior Court granted the corporations' motion for partial summary judgment, denied the Petitioners' motion to dismiss, and dismissed their motion to stay as moot. App. at 76. Addressing the Petitioners' assertion that it lacked subject matter jurisdiction, the court oddly said that the Tribes contended that "interpretation of the phrase 'internal tribal matters' lies solely in the hands of federal courts," and it readily discarded that purported contention. App. at 69-70. It did not address the Petitioners' central argument: that control over the general right of the public to access tribal records within the reservations is an "internal tribal matter," and, therefore, not subject to state jurisdiction under the MAA. *See id.* Instead, it presumed that the Tribes, "when acting in a governmental capacity," take on "the status of a 'political subdivision' " of Maine, *id.* at 72, and then looked at the *subject matter* of the corporations' MAA access demand, ultimately agreeing with the corporations and the State that the records sought did not concern "internal tribal matters." *Id.* at 73-76. The Court ordered the Tribes to comply with the

corporations' demands by October 3, 2000 and list any standard privileges claimed for documents withheld. App. at 76.[9]

C. The Maine Superior Court's Final Judgment, Contempt Proceedings, and the Tribes' Appeal to the Maine Supreme Judicial Court

Tensions rapidly escalated at this point. The corporations, through counsel, refused an attempt on the part of the Penobscot Nation to preserve the integrity of its reservation boundary:

> *The Penobscot Nation states that we will not be allowed onto Indian Island to review records. This position is unacceptable and not in compliance with the requirements of the [MAA].* The [MAA] expressly states that "every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record. . . . " 1 M.R.S.A. § 408. *This gives us the right to inspect the records at the offices in which they are located.*

R.No. 76 at 7 (emphasis added).

When the Tribes failed to comply with the corporations' demands, the corporations sought and obtained from the state court an order, dated October 18, 2000, entering "final judgment" against the Petitioners under the MAA and waiving any privileges. R.No. 77. Next, on

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[9] Since the Petitioners never suggested that the Superior Court lacked power to interpret the 'internal tribal matters' provision, *see* App. at 42-49, and Superior Court appeared to misapprehend the fundamental issues raised by the Petitioners, on September 26, 2000, they asked the court to set aside its Decision and Order and squarely address those issues. *Id.* at 77-79. The Superior Court summarily denied that motion the next day. *Id.* at 79.

November 9, 2000, pursuant to a contempt motion filed by the corporations, the state court ordered the coercive imprisonment of Penobscot Chief Barry Dana and Passamaquoddy Governors Richard Doyle and Richard Stevens, together with civil penalties against each Tribe of $1,000 per day. *See* Transcript of Hearing held Nov. 9, 2000, entered in Docket No. CV-00-329, Maine Superior Court (entry dated May 31, 2001) at 57-58.

Upon request of the Tribes' counsel, the court released Chief Dana and Governors Doyle and Stevens on "personal recognizance bonds" until November 13, 2000. *Id.* at 61-63. The court's written contempt order provided that it would suspend the tribal leaders' incarceration and the civil penalties if the Tribes either (a) allowed the corporations full access to the tribal records as demanded in their May 10, 2000 letters or (b) timely appealed the case to the Maine Supreme Court. R.No. 106. The Tribes appealed on November 13, 2000. R.No. 108.[10]

D. Arguments Presented and their Disposition by the Maine Supreme Judicial Court

Before the Maine Supreme Court, the corporations, relying upon the *Stilphen* court's approach, asserted that they could access the Tribes' reservation records and files pursuant to the MAA because they "did not ask to attend

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[10] The next day, pursuing the fastest course to judgment, the corporations moved to expedite the appeal, based upon the same MAA speedy trial provision they had referenced in threatening the Superior Court with mandamus, *see supra* note 7. *Plaintiff-Appellees' Motion to Expedite Appeal*, entered in Maine Supreme Judicial Court, Docket No. Cum-00-573 ("Maine SJC Docket"). Over the Tribes' objection, the Maine Supreme Judicial Court granted the motion. *See* Order, dated November 20, 2000, Maine SJC Docket.

any tribal rites." *Brief of Appellees*, Maine SJC Docket, at 10. The State of Maine, supporting the corporations, argued that the Court's starting premise must be that the Tribes' "governmental capacity" is that of a municipality and that they are, therefore, controlled by the State under a "municipal model," with very "limited exceptions" for things "uniquely tribal." *Brief of Appellee-Intervenor, State of Maine*, Maine SJC Docket, at 13, 21, 25, 32, 34.

As in the Maine Superior Court, Petitioners pointed out, in accord with *Fellencer*, that "the construction of section 6206(1) [is] a federal question," to be construed in accordance with Congress' intent. App. at 82, 93-105. They argued that Congress' preservation of their right to govern "internal tribal matters" meant that they "must be free to govern public 'rights of access' to tribal government . . . documents within the reservations without external regulation by the State of Maine." App. at 80. They further pointed out that the State's view of the Tribes' "governmental capacity" as that of a state municipality erased "the protection that Congress intended to afford tribal self-government upon ratifying the 'internal tribal matters' provision of section 6206(1)," and grossly inflated their agreement to meet certain "duties" and "obligations" of municipalities under the first clause of section 6206(1). App. at 99. They asserted that their "right to govern the terms and conditions *for the general public* to enter their reservations to access, inspect and copy tribal governmental documents" was "an intrinsic attribute of their inherent, self-governing authority." App. at 100 (emphasis in original); *see id.* at 80, 92. Thus, as in the Superior Court, the Tribes squarely presented the federal questions herein to the Maine Supreme Judicial Court. *See supra* note 8.

In its decision, dated May 1, 2000, the Maine Supreme Court relied upon its nineteenth century decisions in *Murch* and *Newell*, to initially conclude that the Tribes had no "established tribal sovereignty" prior to the Settlement Act. App. at 10-11. "Although the Tribes were recognized in a cultural sense," the court said, "they were simply not recognized by the state or federal government in an official or 'political sense.' " *Id.* at 11. Focusing on the "municipal obligations and duties" clause of section 6206(1), the court held that "in their capacities as governments of Indian territories in Maine," the Tribes' "governmental status" is that of a state municipality, and they are, therefore, subject "to state laws affecting municipal governments." *Id.* at 24; *see also id.* at 15-17, 20.

The Court said that the task of squaring this presumed "municipal status" with the "internal tribal matters" provision of section 6206(1) presented a "complex" problem and was a "murky area." App. at 26-27. It did not address the Tribes' argument that this ambiguity must be resolved in accordance with "prior legal understandings" of federal Indian common law and the canon of construction requiring that attributes of tribal sovereignty, not expressly divested by Congress, be preserved. *Compare* App. at 27-29 *with* App. at 83-84, 98-99. Instead, consistent with *Stilphen*, the court construed the clause as an ordinary state statute without reference to this Court's principles of federal Indian common law. *Id.* at 8. It concluded that while the agendas and minutes of tribal council meetings generally would not be subject to inspection, other documents would be. *Id.* at 31, 33. It left

the Respondent corporations free to intrude upon the reservations in search for records. *Id.* at 33-34.[11]

E. The First Circuit's Decision and the Petitioners' Pending Stay Motion

On June 20, 2001, the First Circuit decided *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317 (1st Cir. 2001) (Boudin, C.J.). Noting "uncertainties" surrounding the district court's application of the "well-pleaded complaint rule," the court said it was unnecessary to address that issue. *Id.* at 323. Applying the rule of *res judicata*, the court said that because the Maine Supreme Judicial Court had won "the race" to judgment, the Tribes' action in the district court was "superfluous." *Id.* at 323, 325. The court was careful to point out that the Tribes could seek relief in this Court from the state court decisions: "The Supreme Court is entitled to review a state-court decision that decides a federal issue . . . . If the Supreme Court does take the case and decides it differently, then all the relief that the Tribes seek would be furnished on remand in the state system." *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d at 324.

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[11] On May 15, 2001, the Petitioners moved for reconsideration, explaining that, contrary to footnote 3 of the decision, they never abandoned their claim that the court lacked subject matter jurisdiction to proceed with an MAA enforcement action against them. *See* App. at 106-11. Indeed, they pointed out that the "internal tribal matters" prohibition implicated their sovereign immunity from suit, and, therefore, the court's subject matter jurisdiction. *Id.* In addition, they pointed out that an apparently pivotal factual premise – that the Tribes were petitioning the federal government to gain regulatory authority over water quality matters to the exclusion of Maine – was baseless. *See* Defendants' Motion for Reconsideration, Maine SJC Docket, at 2, 8-11. On May 31, 2001, without discussion, the court denied the motion. App. at 36.

The Tribes then moved the Maine Superior Court to stay proceedings in front of it, pending disposition of the instant Petition. The corporations oppose the requested stay, and are seeking immediate enforcement of their claimed rights to intrude into the reservations.[12]

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court Should Grant the Writ Because the Decision of the Maine Supreme Judicial Court Raises Federal Questions of Fundamental Importance.

The decisions of the courts below threaten the very existence of the Tribes, as tribes. This is not an exaggeration. Cases involving the rights of Indian tribes to be secure in their territory in the face of state power and local economic interests, are at the core of this Court's Indian law jurisprudence. *See Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v. Georgia*, 6 Pet. 515, 561 (1832). *See generally* Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 25 J. SUP. CT. HIST. 215 (2001). This is because the right of Indian tribes to control the terms and conditions under which strangers enter their reservations to access tribal property – be it tribal records or tribal artifacts – is a critical attribute of their retained sovereignty, which remains intact absent *unequivocal* elimination by Congress. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983) ("A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established");

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[12] Petitioners' motion to stay was entered August 8, 2001 in the Maine Superior Court, Docket No. CV-00-329, and the corporations' opposition was entered as part of that docket on August 15, 2001. As of the date of this Petition, the motion remains pending.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) (same). Control over "nondesireable nonmembers[']" entry to a reservation is considered *"essential to [a] tribe's identity or its self-governing status." Nevada v. Hicks*, 533 U.S. ___, 121 S.Ct. 2304, 2320 (2001) (Souter, J., with Kennedy and Thomas, J., concurring) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1015 (9th Cir. 1976) (Kennedy, J., dissenting)) (emphasis added). The Indian law treatise most widely cited by this Court describes this as "a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory . . . , *it is an internal matter* over which sovereignty is retained." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 252 (1982 ed.) (emphasis added).

This right is at stake here. By invoking the MAA against the Tribes, the corporations – wholly "nondesireable nonmembers" – seek to harness state power, and, on demand, enter the reservations, leaf through the Tribes' file cabinets, examine their computer hard drives, and demand copies.

Equally at stake is the Tribes' interest in maintaining the integrity of their governmental authority by dealing with "public access" matters pursuant to their own policies, procedures, and customs. *See United States v. Mazurie*, 419 U.S. 544, 557-58 (1975) (Tribes possess "independent authority over matters that affect the internal and social relations of tribal life" and this Court has "consistently guarded the authority of Indian governments over their reservations") (citation omitted). By invoking the MAA against the Tribes, the corporations seek to force the Tribes to submit to the public access procedures, policies, and values of the State of Maine,

which are far removed from those of these tribal communities. *See* 1 M.R.S.A. § 401-410.[13] The terms and conditions for the general public's entry into the reservations, what the public may inspect once inside, and where and how the public may enforce its "rights" of such access are intimate matters of self-government, which must be left to the Tribes. *See Williams v. Lee*, 358 U.S. at 220 ("Absent governing Acts of Congress, the question has always been whether the state action infringe[s] on the right of reservation Indians to make their own laws and be governed by them.").

In sum, at stake in this case are the basic rights of the Penobscot Nation and the Passamaquoddy Tribe to maintain both the integrity of their reservation boundaries and the dignity of their authority as Indian tribal governments. Where, as here, a state court of last resort has adjudicated a controversy in derogation of such rights, this Court considers tribes' certiorari petitions with *"particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983) (emphasis added). The

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[13] Under the MAA any member of the public, on demand, could enter tribal government offices inside the reservations "to inspect and copy" records "during regular . . . business hours." 1 M.R.S.A. § 408. If disgruntled, such a person could then immediately commence a statutory enforcement action in that person's home county (as the corporations have done in the instant case) in any of Maine's 16 county courts, 1 M.R.S.A. § 409(1), in a state spanning 33,215 square miles (or more than the other five New England states combined). The court, by statute, would then give priority to the action over other civil matters, *id.*, and evaluate and impose disclosure requirements and exemptions in accordance with public policies set by the state. *See* 1 M.R.S.A. §§ 401, 402(3) (West Supp. 2000).

fundamental interests at stake in this Petition for the Penobscot Nation and the Passamaquoddy Tribe – their freedom (or immunity) from state power and their rights of self-government – are compelling. Under the "exacting scrutiny" called for, this Petition should be allowed.[14]

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[14] The Tribes note what is *not* at issue in this Petition. This is not a case in which an Indian tribe seeks to *impose* jurisdiction upon nonmembers as in the case of *Nevada v. Hicks*, 533 U.S. ___, 121 S.Ct. 2304 (2001), decided last term. In *Hicks*, this Court held that a tribal court could not assert jurisdiction over a tribal member's claims against state officials arising out of their execution of a state search warrant, inside his home on the reservation, to investigate his alleged commission of an off-reservation crime. *Id.* This case presents the converse of *Hicks*. In this case, non-members (the corporations) seek *to impose state authority upon the Tribes* to gain entry to their reservations. As noted in the text, the Tribes' freedom from such a coercive use of state power by outsiders, the very issue presented by this Petition, is generally considered *"essential to [a] tribe's identity or its self-governing status."* *See Hicks*, 533 U.S. at ___, 121 S.Ct. at 2320 (Souter, J., with Kennedy and Thomas, J., concurring) (quotation and citation omitted).

Nor is the issue presented by this Petition controlled by this Court's decision in *Department of Interior v. Klamath Water Users*, 532 U.S. ___, 121 S.Ct. 1060 (2001), also decided last term. *Klamath* addressed the scope of the Department of the Interior's statutory obligations under the Freedom of Information Act, 5 U.S.C. § 552 (1994) ("FOIA"), and held that its communications with an Indian tribe concerning water rights proceedings were not exempt from disclosure under that statute. *Id.* The issue presented by this Petition has nothing to do with what *particular documents* may or may not be privileged from disclosure to the public, whether under FOIA or the MAA. This Petition presents the issue of the Tribes' right to control entry by the general public onto their reservations and into the files of tribal offices, well inside those reservations, *regardless of the particular subject matter such strangers may wish to access. Klamath* has no bearing on this issue.

The argument for a grant is all the stronger because, at least under the view of the well-pleaded complaint rule espoused by the federal district court and left standing by the First Circuit, this Court may well be the only federal forum ever available to the Tribes for resolution of the fundamental federal questions presented here. While this Court properly defers to the state courts in many areas of federal concern, it does not readily do so in the field of Indian affairs. *See San Carlos Apache Tribe*, 463 U.S. at 566-67 (there is a "good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"). *Accord Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 313 n.11 (1997) ("the readiness of the state courts to vindicate the federal right[s of Indian tribes] has been less than perfect") (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting). Moreover, there may come no other time – other than this case – in which the State of Maine is present and before the Court, given its immunity under the Eleventh Amendment. The writ should issue.

II. The Court Should Grant the Writ to Resolve the Conflicting Views of the Maine Supreme Judicial Court and the First Circuit Regarding Petitioners' Proper Status as Tribes.

The Maine courts have sanctioned a fundamental intrusion into tribal affairs because they have a view of the Tribes which is fundamentally at odds with that of the First Circuit. This Court should therefore grant the writ to resolve this conflict over the proper status of the Tribes under federal law.

The Maine Supreme Judicial Court's view, rooted in its nineteenth century decisions in *Murch* and *Newell*, is that the State's historic domination of the Tribes

eliminated their inherent attributes of tribal self-government. *See* App. at 11 (citing *Murch* and *Newell*); *Stilphen*, 461 A.2d at 487. The Tribes' political identities, according to the Maine courts, were defined on a blank slate in 1980 and captured in whole in the Maine Implementing Act, which they view as an ordinary state statute. *See* App. at 24; *Stilphen*, 461 A.2d at 489. Thus, the Maine courts presume the existence of Maine's authority over the Tribes "as municipalities" pursuant to the municipal "duties and obligations" clause of section 6206(1) and accept the "internal tribal matters" provision only as a "narrow" defense. *See* App. at 24-27. The determinative "legislative history" supporting this view is Maine's own Attorney General's statements, which decry notions of tribal sovereignty and reduce the concept of "internal tribal matters" to a narrow cultural stereotype: things "uniquely Indian." *See* App. at 17 ("As Attorney General Cohen put it, 'Let there be no mistake. . . . This proposed Settlement does not create any nation within a nation' "); *Stilphen*, 461 A.2d at 490 ("the Attorney General of the State of Maine understood the 'internal tribal affairs' exception to have been drafted 'in recognition of the Indians' unique cultural or historical interest' ").

In contrast, the First Circuit's view, rooted in its pre-Settlement Act decisions in *Bottomly* and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975), is that the Tribes' attributes of inherent sovereignty cannot be lost by "the passage of time" or the Tribes' "apparent assimilation" by the State of Maine. *Penobscot Nation v. Fellencer*, 164 F.3d at 709 (F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231 (1982 ed.)).[15] Its

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[15] Indeed, in *Morton*, the First Circuit rejected *Newell*, and, by implication, its underpinnings in *Murch*. *See* 528 F.2d at 380.

starting premise is *not* that the Tribes are presumptively subject to state authority "as municipalities" pursuant to the municipal "duties and obligations" clause of section 6206(1). To the contrary, the First Circuit views the Tribes' "internal tribal matters" as attributes of tribal self-government (not expressly taken away by Congress), which, in order to have meaning, must be immune from state control. *See Fellencer*, 164 F.3d at 709, 712-13 ("internal tribal matters" bars "state court jurisdiction"). It looks to this Court's established principles of federal Indian common law – *"prior legal understandings"* – to identify the attributes of inherent tribal authority at issue. *See Fellencer*, 164 F.3d at 712; *Akins*, 134 F.3d at 489. Further, it looks at Congress' intent in ratifying section 6206(1), not the pronouncements of state representatives, as the controlling guide for interpreting the language at issue. *Fellencer*, 164 F.3d at 709-712.[16]

See also Bottomly, 599 F.2d at 1064 (rejecting State's continuing arguments that its historic domination of the Tribes destroyed their inherent sovereignty).

[16] The First Circuit observes that Congress is presumed to act "against the backdrop of prior law," *Fellencer*, 164 F.3d at 712; *Akins*, 130 F.3d at 489, and that Congress' identical final committee reports expressly

> predicate[ ] the [Tribes'] right to be free from state interference on the [Tribes'] "inherent sovereignty" as recognized in *Bottomly* and *State v. Dana*. Both *Bottomly* and *Dana* drew on federal Indian common law in recognizing the inherent sovereignty of the Penobscot and Passamaquoddy tribes. The Report[s] state[ ] that "in keeping with" the sovereignty recognized in *Bottomly* and *Dana*, it was Congress' intent to guarantee that the [Tribes] "would be free from state interference in the exercise of [their] internal affairs." By characterizing its recognition of the [Tribes'] sovereignty as "in keeping with"

The crisis prompted by Respondents' efforts to intrude upon the Tribes' reservations has lit up these conflicting approaches of the First Circuit and the Maine Supreme Judicial Court.

Most strikingly, while stating that it would weigh state and tribal interests in this case against a backdrop of "prior legal understandings" in accordance with the First Circuit's approach, *see* App. at 27, the Maine Supreme Judicial Court did not do so. Indeed, it entirely failed to even address Petitioners' crucial claim: that control over the terms and conditions under which strangers may enter their reservations to inspect and copy their records and computer files is essential to their ability to maintain authority as Indian tribal governments. *See id.* Nor did it measure the Tribes' interests against "prior legal understandings" under principles of federal Indian common law established by this Court in accordance with the First Circuit approach. *Compare id. with Fellencer,* 164 F.3d at 709, 711-12; *Akins,* 130 F.3d at 489-90. Instead, in circular fashion, it simply referred to "prior legal understandings" as "the intent of the settlement acts," and left it at that. App. at 27.

In short, in the Maine Supreme Judicial Court – in complete contrast to the First Circuit – the "prior legal understandings" reflected in this Court's decisions protecting tribal sovereignty in the face of asserted state

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> *Bottomly* and *Dana,* Congress signaled its intent that federal Indian common law give meaning to the terms of the settlement.

Fellencer, 164 F.3d at 712 (citations omitted) (quoting S. REP. NO. 96-957, at 14).

power have no bearing on the outcome of disputes concerning the crucial language of section 6206(1). Its starting premise is not the protection of tribal self-government; rather, it presumes the existence of state power under a "clear" municipal model, *see* App. at 19 (referring to the "clarity" of Maine's jurisdiction over the Tribes), while relegating "internal tribal matters" not expressly enumerated to a "murky" defense to such presumed state authority. *See* App. at 27.

It is no surprise, then, that Respondents engaged in a race to judgment here; for there is little question that this matter would have been decided differently under the First Circuit's approach. If the interests of the Tribes were fully considered in accord with the established "prior legal understandings" of this Court, as the First Circuit requires, and these interests were then balanced against any state or non-member interests under that Court's approach, the Tribes' interests would, no doubt, prevail. The Tribes' control of non-Indians' "public access" to their reservations and property is "essential" to their self-governing authority and identity. *See supra* section I. There are no offsetting state or non-Indian interests to justify the destructive undermining of that authority through the imposition of the MAA upon the Tribes.[17]

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[17] Throughout this litigation, the State has made no claim that its interests are furthered by the imposition of the MAA upon the Tribes. It has entered this litigation only because it involves important questions concerning state jurisdiction over the Tribes. R.No. 21 at 2. The corporations' interests are similarly muddled. They are not "particularized" to the corporations; indeed, the corporations concede that their motives for accessing the Tribes' reservation records are "not relevant." *Appellees' Brief*, Maine SJC Docket at 3. They claim "rights" in the abstract, simply as members of the general

The Maine Supreme Judicial Court's decision – a product of the corporations' and the State's race to obtain judgment in the state court – is in fundamental conflict with the contrasting approach of the First Circuit, now beyond reach for application here by the Tribes. This Court should grant the writ in order to decide which view of the Maine Tribes, that of the First Circuit or that of the Maine Supreme Court, should apply to determine questions going to the heart of the Tribes' existence as tribes.

CONCLUSION

For all of the above reasons, the Court should grant the writ of certiorari and review the judgment of the Maine Supreme Judicial Court.

Respectfully submitted,

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public, pursuant to the MAA. *See* R.No. 2 at 4-5. But even if their individual interests were in balance, given the alternatives available to them for accessing information about the Tribes under the Freedom of Information Act, *see Klamath Water Users*, 533 U.S. ___, 121 S.Ct. 1060 (2001), their interests in entering the Tribes' reservations to gather documents from the Tribes' files would not be considered weighty. *Cf. Nevada v. Hicks*, 533 U.S. at ___ , 121 S.Ct. at 2317 (tribal interest can be met through alternative remedy).

APPENDIX

TABLE OF CONTENTS

Opinion Entered Below:

Great Northern Paper, Inc. v. Penobscot Nation, 770 A.2d 574 (Me. 2001) .....App. 1

Order on Rehearing:

Order of the Maine Supreme Judicial Court, denying Motion for Reconsideration.....App. 36

Constitutional Provisions and Statutes at Issue:

U.S. CONST. art. I, § 8, cl. 3 .....App. 37

25 U.S.C. § 1721(a)(1).....App. 37

25 U.S.C. § 1721(a)(7).....App. 38

25 U.S.C. § 1725(b)(1).....App. 38

25 U.S.C. § 1731.....App. 39

25 U.S.C. § 1735(a) .....App. 39

Laws of the State of Maine, P.L. 1979, ch. 732, § 31.....App. 39

30 M.R.S.A. § 6206(1).....App. 40

Record Excerpts Showing Method and Manner in which Federal Questions Raised:

Great Northern Paper, Inc. v. Penobscot Nation, Maine Superior Court, Docket No. CV-00-329:

Defendants' Motion to Dismiss.....App. 42

TABLE OF CONTENTS – Continued

Defendants' Consolidated Memorandum of Law in Opposition to Plaintiffs' "Motion for Partial Summary Judgment," and in Support of Defendants' Motion to Dismiss, with "Exhibit 2," Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law, *Penobscot Nation v. Georgia-Pacific Corp.*, United States District Court for the District of Maine, Civil No. 00-101-B .....App. 44

Decision and Order Denying Defendants' Motion to Dismiss .....App. 67

Defendants' Motion for Relief from Decision and Order (Memorandum Incorporated) .....App. 77

Great Northern Paper, Inc. v. Penobscot Nation, Maine Supreme Judicial Court, Docket No. Cum-00-573:

Brief of Appellants .....App. 80

Reply Brief of Appellants .....App. 92

Defendants' Motion for Reconsideration .....App. 106

MAINE SUPREME JUDICIAL COURT

Reporter of Decision

Decision: 2001 ME 68
Docket: Cum-00-573
Argued: February 13, 2001
Decided: May 1, 2001

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, and ALEXANDER, JJ.

GREAT NORTHERN PAPER, INC., et al

v.

PENOBSCOT NATION et al.

SAUFLEY, J.

[¶ 1] This case requires us to decide whether the Maine Freedom of Access Act, 1 M.R.S.A. §§ 401-410 (1989 & Supp. 2000), which is ordinarily applicable to municipalities and other components of state government, is applicable to the Penobscot Nation and the Passamaquoddy Tribe. We conclude that the Act does not apply to the Tribes when they act in their municipal capacities with respect to internal tribal matters. We further conclude that the Act does apply to the Tribes when they interact with other governments or agencies in their municipal capacities.

[¶ 2] The dispute before us began when Great Northern Paper, Inc., Georgia-Pacific Corporation, and Champion International Corporation filed a complaint pursuant to the Freedom of Access Act, 1 M.R.S.A. §§ 401-410, seeking certain documents in the Tribes' possession. Ultimately, the Superior Court (Cumberland County, Crowley, J.) denied the Tribes' motion to dismiss

the complaint and granted the paper companies' motion for summary judgment, thereby requiring the Tribes to turn over the documents requested by the paper companies. We affirm the judgment in part and vacate in part.

I. BACKGROUND

[¶ 3] The facts relevant to our analysis are not disputed. Great Northern Paper, Inc., is a Maine corporation that owns and operates pulp and paper mills in Millinocket and East Millinocket, both of which discharge treated wastewater into the West Branch of the Penobscot River, upstream of the Penobscot Indian Reservation. Georgia-Pacific Corporation is a Georgia corporation that owns and operates a pulp and paper mill in Woodland, Maine, which discharges treated wastewater to the St. Croix River, downstream of the Indian Township Reservation of the Passamaquoddy Tribe. The mouth of the St. Croix River is just northwest of the Pleasant Point Reservation of the Passamaquoddy Tribe. Champion International Corporation owns and operates a paper mill in Bucksport, Maine, which discharges treated wastewater into the Penobscot River, downstream of the Penobscot Indian Reservation. All three paper companies have federal and state discharge licenses authorizing their wastewater discharges.

[¶ 4] Pursuant to the National Pollutant Discharge Elimination System program of the federal Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 2000), the State of Maine has applied to the U.S. Environmental Protection Agency to gain control over the issuance of all wastewater discharge permits in the state. *See* 33 U.S.C.A.

§ 1342(b) (West 1986 & Supp. 2000). In response to Maine's application, the Tribes urged the EPA to conclude, in part, that the state is not entitled to regulate the water resources within their territories, because they are entitled to be treated like a separate "state." *See id.* § 1377(e) (West Supp. 2000). Upon learning of the Tribes' efforts in that regard, the companies sought information from the Tribes relating to those efforts.[1]

[¶ 5] Through their attorneys, the paper companies served written requests upon the Governors of the Penobscot Nation and the Passamaquoddy Tribe, requesting, pursuant to Maine's Freedom of Access Act, 1 M.R.S.A. §§ 401-410, certain documents relating to the Tribes' efforts to gain regulatory powers over water resources within or adjacent to their borders. Specifically, the companies sought "[a]ll documents," including, without limitation, "notes, records, or minutes of all meetings or proceedings of [the Tribes] . . . that relate in any way to":

> 1. the regulation of water resources within [the Tribes' territories] and in adjacent waters;
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> 2. the State of Maine's application to obtain delegation of permitting authority under the Clean Water Act's National Pollutant Discharge Elimination System program;

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[1] According to the parties, the state's application has been granted with respect to all parts of the state except the tribal territories. The matter of regulating water treatment on tribal land is still pending with the EPA.

> 3. [the Tribes'] alleged authority to protect or regulate water resources within or adjacent to [the Tribes' territories];
>
> 4. efforts by [the Tribes] to obtain "treatment as a State" status pursuant to Section 518 of the Clean Water Act, 33 U.S.C. § 1377;
>
> 5. efforts by [the Tribes] to have the U.S. Environmental Protection Agency adopt water quality standards different from those of the State of Maine for any waters located in the State of Maine;
>
> 6. any agreements with federal government agencies . . . that relate to the protection or study of water or other natural resources.

[¶ 6] The companies sought these documents "to educate themselves regarding issues affecting their discharge permits." They asserted that they were entitled to the documents pursuant to the "public records" provisions of the Freedom of Access Act, 1 M.R.S.A. § 402(3) (1989 & Supp. 2000), and in accordance with Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. §§ 6201-6214 (1996 & Supp. 2000) (the Maine Implementing Act),[2] as ratified by Congress pursuant to

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[2] The Maine Implementing Act was passed in 1980 and became effective later that year when Congress passed the Settlement Act. *See* 25 U.S.C.A. §§ 1721-1722 (West 1983) (ratifying the Maine Implementing Act, which means "section 1, section 30, and section 31, of the 'Act to Implement the Maine Indian Claims Settlement' enacted by the State of Maine in chapter 732 of the public laws of 1979"). Section 6206 of the Maine Implementing Act defines the "[p]owers and duties of the Indian tribes within their respective Indian territories" and sets forth the relationship between the Tribes and the state. 30 M.R.S.A. § 6206 (1996).

the Maine Indian Claims Settlement Act of 1980, 25 U.S.C.A. §§ 1721-1735 (West 1983 & Supp. 2000) (the Settlement Act).

[¶ 7] The Tribes denied the companies' requests, responding, in part, that "the Maine Freedom of Access Act is inapplicable to [the Tribes]," because "the application of that law . . . would amount to state regulation of [the Tribes'] governmental process, policies, and procedures." The Tribes did offer, however, to provide the companies with copies of records in their possession that are "not confidential under [the Tribes'] laws and policies concerning matters of tribal government" and are not "privileged from disclosure to adverse parties under . . . discovery rules or rules of evidence."

[¶ 8] The companies then commenced this action against the Tribes pursuant to 1 M.R.S.A. § 409(1) (1989), claiming that (1) pursuant to 30 M.R.S.A. § 6206(1) (1996) of the Maine Implementing Act, the Tribes have "all of the rights and are subject to all of the duties, obligations, liabilities, and limitations of municipalities"; (2) the Freedom of Access Act, by its terms, "makes all public records, including all records in the possession or custody of . . . the State 'or any of its political subdivisions,' available for public inspection"; (3) the documents requested by the companies are "public records"; and (4) by refusing to comply with the companies' requests, the Tribes have violated the Freedom of Access Act. Soon thereafter, the companies filed a motion for partial summary judgment.

[¶ 9] The Tribes filed a consolidated motion in opposition to the companies' summary judgment motion and

in favor of their motion to dismiss the companies' action, arguing that the Superior Court lacked subject matter jurisdiction and that the Act could not, as a matter of law, be invoked against the Tribes, because section 6206(1) of the Maine Implementing Act prohibited direct state regulation of "internal tribal matters."[3] The Superior Court denied the Tribes' motion to dismiss and granted the companies' motion for partial summary judgment. Subsequently, the Superior Court also denied the Tribes' Rule 60 motion for relief from the judgment denying their motion to dismiss. *See* M.R. Civ. P. 60.

[¶ 10] In its order granting partial summary judgment, the court ordered the Tribes "to turn over all non-privileged documents as well as logs of all documents claimed to be privileged no later than 14 days from the date of this order." The Tribes failed to turn over any documents or logs of any documents claimed to be privileged, and accordingly, the Tribes were deemed to have waived the claims of privilege. Because the Tribes asserted that the Freedom of Access law could not be applied to them in any way, they did not argue that even if the Act applied, the paper companies' requests were overbroad. Consequently, in the absence of a preserved privilege or a request to tailor the paper companies' demands to protect specific internal tribal matters, the Superior Court entered a final judgment in favor of the

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[3] Before us, the Tribes do not contend that the Superior Court lacked subject matter jurisdiction. We take judicial notice of the Tribes' action in the United States federal district court seeking to enjoin the paper companies from invoking the Freedom of Access Act against them. *See Penobscot Nation v. Georgia-Pacific Corp.*, 116 F.Supp. 2d 201 (D. Me. 2000).

companies, granting full relief to the companies on their Freedom of Access requests.[4] After being held in contempt of the court for their continuing failure to comply with that order, the Tribes appealed to this Court.[5]

II. DISCUSSION

[¶ 11] The applicability of the Freedom of Access Act to Maine's Indian Tribes is a matter of first impression. That Act does not explicitly mention the Tribes as covered by, or excluded from, its terms, nor do either of the Indian land claims settlement acts directly address the applicability of the Freedom of Access Act.

[¶ 12] In construing the statutes before us, we begin with the recognition that the applicability of state statutes to the Tribes occurs in a framework that is unique to Maine. *See* 25 U.S.C.A. §§ 1721-1735; 30 M.R.S.A. §§ 6201-6214. The relationship between the State of Maine and the Tribes is not governed by the general federal laws that define such relationships. *Id.*; *Penobscot Nation v. Fellencer,* 164 F.3d 706, 708 (1st Cir. 1999). Rather, it is governed by the two Acts, one state and one federal, both

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[4] The Tribes appealed the Superior Court's final judgment only "to the extent" that it denied their motion to dismiss. The court held a consolidated hearing on the Tribes' motion to dismiss and the companies' motion for summary judgment, considered the exhibits submitted by the parties, and in effect treated the Tribes' motion as a competing motion for summary judgment. We therefore review both the denial of the Tribes' motion and the grant of the companies' motion for summary judgment.

[5] The Superior Court stayed the order of contempt when the Tribes filed this appeal.

memorializing a settlement of disputed claims brought by the Tribes in the 1970s against the state for vast portions of Maine land. *See* 25 U.S.C.A. §§ 1721-1735; 30 M.R.S.A. §§ 6201-6214; *see also Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380-81 (1st Cir. 1975); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983).

[¶ 13] In order to resolve the question before us, we must construe the Maine Implementing Act, the Federal Settlement Act, and the Maine Freedom of Access Act to determine whether (1) the application of the Freedom of Access Act to the Tribes, as a matter of law, is prohibited by the state and federal settlement acts and, if not, (2) whether any parts of the companies' specific requests are barred by application of the settlement acts.

[¶ 14] Statutory construction is a question of law, and we review the Superior Court's interpretation of the Freedom of Access Act and the Maine Implementing Act de novo. *See Bangs v. Town of Wells*, 2000 ME 186, ¶ 9, 760 A.2d 632, 635; *Francis v. Pleasant Point Passamaquoddy Hous. Auth.*, 1999 ME 164, ¶ 5, 740 A.2d 575, 577. In interpreting the Implementing Act, we look to the Act itself and its legislative history. *Stilphen*, 461 A.2d at 489. The interpretation of the Act by the First Circuit Court of Appeals also provides guidance to our analysis.

[¶ 15] Our main objective in statutory interpretation is to give effect to the Legislature's intent. *N.A. Burkitt, Inc. v. Champion Rd. Mach. Ltd.*, 2000 ME 209, ¶ 6, 763 A.2d 106, 107. To give effect to the Legislature's intent, we look first to the statute's plain meaning and, if there is ambiguity, we look beyond that language to the legislative history to determine the intent of the Legislature.

Kimball v. Land Use Regulation Comm'n, 2000 ME 20, ¶ 19, 745 A.2d 387, 392.

[¶ 16] Each of the three Acts under scrutiny is devoid of any language that directly addresses the applicability of Maine's Freedom of Access Act to the Tribes. Thus, the question presented cannot be resolved on the plain language of the law. The positions of the competing parties make the ambiguities in the law apparent. The Tribes argue that the Freedom of Access Act may not be invoked against them because the application of the Act would amount to an impermissible regulation of the Tribes' right to control their "tribal government," as prohibited by Maine's Implementing Act, 30 M.R.S.A. § 6206(1). The companies, the state, and the amicus curiae collectively contend that the Tribes agreed to be treated as municipalities under the Maine Implementing Act, 30 M.R.S.A. § 6206(1), and that municipalities are subject to the provisions of the Freedom of Access Act, 1 M.R.S.A. § 402.

[¶ 17] Because the question is not clearly resolved by the language of any of the three Acts under consideration, we turn to the legislative history of those laws to determine the applicability of the Freedom of Access Act to the Tribes.

A. The Maine Implementing Act as Ratified by the Federal Settlement Act

[¶ 18] It is frequently noted that the settlement between the State of Maine and the Tribes created a unique new legal relationship between the Tribes and the state. What is sometimes overlooked, however, is the fact that the relationship between the state and the Tribes

preceding the settlement was also unique. A thorough understanding of the nature of the settlement requires an understanding of that history.

[¶ 19] Any consideration of Indian law must begin with the basic tenet that the power to regulate Indian affairs originates in Congress. Pursuant to the Commerce Clause of the United States Constitution, Congress has the plenary authority to legislate over Indian affairs, *see* U.S. Const. art. I, § 8, cl. 3, and "only Congress can abrogate or limit an Indian tribe's sovereignty." *Fellencer*, 164 F.3d at 709.

[¶ 20] That congressional authority, however, was traditionally exercised only when the sovereignty of a group of Indians was recognized by the federal government. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). From the time that Maine was ushered into the United States as a state separate and independent from Massachusetts in 1820, the United States government consistently declined to recognize or to assume responsibility for the Indians residing in Maine. 25 U.S.C.A. § 1721(a)(9) (West 1983); *Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649, 652-53 (D. Me. 1975), *aff'd by* 528 F.2d 370. The State of Maine, in turn, undertook the almost exclusive role of assisting and regulating the Indians residing within its borders. *See* 25 U.S.C.A. § 1721(a)(9); *Murch v. Tomer*, 21 Me. 535 (1842).

[¶ 21] The absence of established tribal sovereignty was evidenced by the state's extensive role in governing the Tribes throughout the history of the State of Maine. Consistent with this role, Maine actively regulated the affairs of Indians within its borders for almost 160 years,

creating hundreds of laws that specifically related to the protection and regulation of the Tribes. *See* 22 M.R.S.A. §§ 4701-4836 (1964) (detailing the rules and regulations that apply to the Tribes) (repealed in substantial part by Maine Implementing Act, P.L.1979, ch. 732); *Morton*, 528 F.2d at 374. Indians residing within Maine's borders were subjected to the general laws of the state like "any other inhabitants" of Maine. *State v. Newell*, 24 A. 943, 944 (Me. 1892) ("They are as completely subject to the state as any other inhabitants can be."); *Murch*, 21 Me. at 537 ("We have in express terms extended our legislation over them; and over their territory[.]"); *cf. Dana v. Tracy*, 360 F.2d 545, 548 (1st Cir. 1966).

[¶ 22] Although the Tribes were recognized in a cultural sense, they were simply not recognized by the state or the federal government in an official or "political sense." *Newell*, 24 A. at 944; *see also Indian Township Passamaquoddy Reservation Hous. Auth. v. Governor of State*, 495 A.2d 1189, 1190 (Me. 1985). Prior to the settlement, the federal government never entered into a treaty with the Tribes nor did Congress enact any legislation mentioning the Tribes. *Morton*, 528 F.2d at 374. The regulation by state government, coupled with the total absence of congressional regulation, contrasted sharply with many tribes in other states. *See, e.g., In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 738-39 (1866).

[¶ 23] For more than a century, this situation went substantially unquestioned. *See* H.R. Rep. No. 96-1353 (1980). In 1975, however, the Tribes' relationship with the state and the federal government changed substantially as a result of a significant court decision. *See Morton*, 528 F.2d at 380-81. Early in the 1970s, the Tribes had asserted

claims for vast portions of lands in Maine on the basis that the lands in question had been transferred from them in violation of the federal Indian Nonintercourse Act of 1790, which protected "any . . . tribe of Indians." *Id.* at 372-73. The Tribes asked the Department of Interior, Bureau of Indian Affairs, to file a protective action on the Tribes' behalf against the State of Maine, to reclaim the lands that had allegedly been transferred in violation of the Act. *Id.* at 372. Consistent with its historic approach to Maine's Tribes, the Department denied the Tribes' request, asserting, among other things, that the federal government had never formally recognized the Tribes and that it had no trust relationship with the Tribes. *Id.* at 372-73.[6]

[¶ 24] The Tribes then sued to force the Department to act on their behalf. Ultimately, the United States Court of Appeals for the First Circuit rejected the Department's views and held that the Indian Nonintercourse Act

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[6] On June 23, 1972, the Tribes obtained a preliminary injunction to force the federal government to file suits on their behalf. *See Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 654 (D. Me. 1975). On June 29, 1972, while maintaining that it was not obligated to act on behalf of the Tribes, the federal government filed two suits, *United States v. Maine*, Civil Nos. 1966 & 1969 N.D., against the State of Maine on behalf of the Passamaquoddy Tribe and the Penobscot Nation. *Id.* at 653-54, 669 n.6 (citing Letter from Acting Solicitor of the Department of the Interior, to Assistant Attorney General, Land and Natural Resources Division, Department of Justice (June 20, 1972)). Subsequently, by court's order, those suits were held in abeyance on the court's docket pending full resolution of the legal issues presented in *Passamaquoddy Tribe v. Morton*. *Id.* at 669 n.6.

applied to the Tribes, despite the absence of "specific federal recognition," and that the resulting trust relationship obligated the federal government, at a minimum, to investigate the Tribes' claims and take such action as may be warranted. *Id.* at 378-81.

[¶ 25] The *Morton* decision had several significant effects on the relationship between the Tribes and the state. First, pursuant to the newly recognized federal trust relationship, a fiduciary duty was imposed upon the federal government, requiring it to act on behalf of the Tribes to investigate the validity of their claims against the State of Maine. Second, the continuation of Maine's jurisdiction over the Tribes began to be questioned because the Tribes could potentially invoke the application of other federal statutes on their behalf. *See, e.g., State v. Dana,* 404 A.2d 551, 554 (Me. 1979) (recognizing that the Tribes may be entitled to protections of the federal Major Crimes Act of 1885, which granted exclusive federal jurisdiction over certain crimes committed by Indians in "Indian country").[7] Consequently, because the

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[7] Similarly, in 1979, prior to the enactment of the settlement acts, the U.S. Court of Appeals for the First Circuit concluded that the Passamaquoddy Tribe was protected from suits by the common law doctrine of sovereign immunity. *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1066 (1st Cir. 1979) (citing *United States v. Wheeler,* 435 U.S. 313, 322-23 (1978)) (reasoning that the inherent powers of the Indian tribes are, in general, those of a limited sovereign, which may not be extinguished absent express Congressional intent).

state's relationship with the Tribes was called into question, significant concerns were raised regarding the possibility that the state would discontinue its substantial financial support of the Tribes.[8]

[¶ 26] Amidst the turmoil created by the unsettling effect of the land claims and the disruption of decades of understanding regarding the state's relationship with the Tribes, the Justice Department indicated that it would be forced to pursue the lawsuit against the state on behalf of the Tribes unless the parties could find a way to settle their dispute. Settlement efforts began in earnest in 1977. At least three separate settlement proposals were structured, but ultimately rejected, over the next two years.[9]

[¶ 27] Although the issues which initially presented obstacles to resolution were undoubtedly numerous, several key points of dispute arose during the parties' negotiations. First, the Tribes asserted that they were entitled to receive more land or funds than the proposals carried. Second, identifying the extent of the Tribes' sovereignty and authority over natural resources on tribal land was a

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[8] *See, e.g.*, Memorandum from J.B. Willkie, Facilities Engineer, Eastern Area Office of U.S. Department of the Interior, to Eastern Area Director (June 15, 1979) in 3 Maine Joint Select Committee on Indian Land Claims, Background Information on Indian Land Claims (1980) (on file with the University of Maine School of Law library).

[9] *See generally* Statement of Maine Attorney General Richard S. Cohen regarding the proposed Maine Indian Land Claims Settlement (March 18, 1980) in 2 Maine Joint Select Committee on Indian Land Claims, Background Information on Indian Land Claims (1980) (on file with the University of Maine School of Law library).

source of frequent dispute. And, finally, the specific delineation of the relationship between the state and the Tribes was problematic. The state was resistent to any settlement that would create a "nation within a nation."[10] The Tribe wished to obtain as much autonomy, or sovereignty, as possible. The future nature of the relationship between the state and the Tribe was thus pivotal in the parties' discussions of compromise.

[¶ 28] It was against this backdrop that the final settlement agreement was reached in 1980. Both sides benefitted from the bargain, *see, e.g., Indian Township Passamaquoddy Reservation Hous. Auth.*, 495 A.2d at 1191-92, and the final agreement represented a compromise in the truest sense. All parties gained something and lost something in the final analysis.

[¶ 29] The Tribes gained, among other things, approximately $81.5 million in trust monies and land assets. 25 U.S.C.A. § 1733 (West 1983). They gained the legal capacity of a municipality and assurance of funds to provide municipal services to their membership. They also gained formal recognition as sovereign entities by the federal government. Thus, because the Tribes in

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[10] *See* Testimony of David T. Flanagan on behalf of Governor Joseph E. Brennan, Public Hearing Regarding the Maine Indian Claims Settlement (March 28, 1980) in 1 Maine Joint Select Committee on Indian Land Claims, Background Information on Indian Land Claims (1980) (on file with the University of Maine School of Law library) ("We could never have a nation within a nation in Maine. Such a result would not only be unworkable in a State our size, but it would also promote racial and ethnic hostility and resentment to the ultimate detriment of all of our people.")

Maine "had not historically been formally recognized as sovereign Indians," the Settlement Act and the Implementing Act memorialized federal recognition of their tribal status, confirmed the Tribes' title to designated reservations lands, and "opened the floodgate for the influx of millions of dollars in federal subsidies." *Akins v. Penobscot Nation*, 130 F.3d 482, 483-84 (1st Cir. 1997) (quoting *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996)).

[¶ 30] The state, in turn, gained closure on the Indian land claims that threatened title to vast areas of the state. The state also retained and clarified its authority to regulate Indian affairs in Maine.[11] In the end, the settlement acts extinguished the Tribes' claims to nearly two-thirds of the land area of the state and "achieved a certain sharing of authority with [the Tribes]." *Accord Akins*, 130 F.3d at 484; 25 U.S.C.A. § 1730 (West 1983).

[¶ 31] The description of the state's authority and the delineation of the lines for shared authority was central to the settlement. In order to accommodate the state's resistance to the creation of a "nation within a nation," the model chosen for the sharing of authority between the individual tribes and the state was a municipal model. *See* 25 U.S.C.A. § 1721(b)(3) (West 1983); 30 M.R.S.A. § 6206(1). This model created a framework to

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[11] In designating the state as the political entity authorized to regulate the Tribes, the Settlement Act also made certain subsequently enacted federal statutes inapplicable to the Tribes, absent explicit reference to the Maine Tribes. 25 U.S.C.A. § 1735(b) (West 1983); *see also Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996).

which all involved could look for resolution of any lingering jurisdictional disputes. Because the state's relationship with its municipalities was understood by the framers of the settlement, the model provided a measure of certainty about future relations not otherwise existing. Moreover, because the state's authority over municipal matters was well established, those members of state government who had been resistant to a compromise were reassured by the language of the Maine Implementing Act establishing the state's authority to enforce its laws throughout the state. *See* 30 M.R.S.A. § 6204 (1996).

[¶ 32] Both parties understood the general ramifications of the adoption of the municipal model. As Attorney General Cohen put it, "Let there be no mistake. . . . This proposed Settlement does not create any nation within a nation."[12]

[¶ 33] This aspect of the settlement, however, was not without its opponents. Members of the Tribes who had voted against the agreement in tribal proceedings spoke in opposition to the loss of tribal jurisdiction at the hearing before the Joint Select Committee of the Maine Legislature on Indian Land Claims. *See* Memorandum from the Indian Law Resource Center (Mar. 13, 1980) in 2 Maine Joint Select Committee on Indian Land Claims, Background Information on Indian Land Claims (1980) (on file

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[12] Testimony of Maine Attorney General Richard S. Cohen, Public Hearing regarding the Maine Indian Claims Settlement (Mar. 28, 1980) in 1 Maine Joint Select Committee on Indian Land Claims, Background Information on Indian Land Claims (1980) (on file with the University of Maine School of Law library).

with the University of Maine School of Law library) (opposing the passage of the Implementing Act because the passage of that Act would "virtually terminate the sovereignty of the [Tribes]").

[¶ 34] Nonetheless, on behalf of the Tribes, Thomas Tureen, their attorney, acknowledged the significance of the settlement's jurisdictional compromise. After noting that the Tribes had in recent years been "uniformly successful" in repelling state jurisdiction in many matters relating to Indians, he noted, "In light of all this, one might ask why the Indians were willing to even discuss the question of jurisdiction with the State but simply the answer is that they were obliged to do so if they wanted to effectuate the Settlement of the monetary and land aspects of the claim which they had already worked out with the Carter Administration."[13]

[¶ 35] Thus, one of the most significant aspects of the settlement agreement was the Tribes' acquiescence in the assertion of the state's jurisdiction over the Tribes. Because tribal sovereignty exists at the sufferance of Congress, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), that acquiescence could not be enacted into Maine law without Congressional approval.[14] The necessary

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[13] Testimony of Thomas Tureen, Public Hearing regarding the Maine Indian Claims Settlement (Mar. 28, 1980) in 1 Maine Joint Select Committee on Indian Land Claims, Background Information on Indian Land Claims (1980) (on file with the University of Maine School of Law library).

[14] Tribal sovereignty is not merely subject to the control of Congress; it is subject to "complete defeasance" by federal legislation. *Wheeler*, 435 U.S. at 323.

Congressional approval is set out in no uncertain terms in the Settlement Act:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members . . . shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

25 U.S.C.A. § 1725(b)(1) (West 1983). The Maine Implementing Act in turn limits tribal authority such that the Tribes shall be subject to "all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State." 30 M.R.S.A. § 6206(1).[15]

[¶ 36] In the end, the compromises expressed in the settlement acts established substantial limitations on the sovereignty of Maine's Indian Tribes. The settlement acts, taken together, memorialized the Tribes' agreement to that result and gave Congress's imprimatur to a future in which the Tribes gained clarity of their official status in the eyes of the federal government, while at the same time, the state obtained clarity of its jurisdiction over the Tribes, thus significantly limiting the Tribes' sovereignty in their interactions with the State of Maine.

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[15] More broadly, the Maine Implementing Act states as a general rule that "[e]xcept as otherwise provided in this Act, all Indians, Indian nations, and tribes . . . shall be subject to the laws of the State . . . to the same extent as any other person." 30 M.R.S.A. § 6204 (1996). The "laws of the State" is defined as "the Constitution and all statutes, rules or regulations and the common law of the State and its political subdivisions." *Id.* § 6203(4) (1996).

[¶ 37] The analysis cannot end there, however, because the settlement acts did not simply transform the Tribes into municipalities for all purposes. Rather, the Acts framed jurisdictional issues around a municipal model. That model contained several exceptions, creating distinctions from ordinary municipal law. The Acts also precluded the state's exercise of jurisdiction in certain limited but important areas. Those exceptions and limitations on the state's authority are critical to our analysis.

B. The Parameters of the Municipal Model

[¶ 38] Because the Tribes agreed to be treated as municipalities for purposes of defining their relationship with the State of Maine, state laws that apply to municipalities also routinely apply to the Tribes. For example, similar to any municipality, the Tribes do not have absolute sovereign immunity against law suits. *See* 25 U.S.C.A. § 1725(d)(1) (West 1983). As with other cities and towns, however, the Tribes are entitled to qualified immunity from suits in state and federal courts. *See* 30 M.R.S.A. § 6206(2) (establishing a Tribe's qualified immunity when "acting in its governmental capacity to the same extent as any municipality"); *Couturier v. Penobscot Indian Nation*, 544 A.2d 306, 307 (Me. 1988). The Implementing Act provided the Tribes broad ordinance powers pursuant to a municipality's home rule authority. *See* 30 M.R.S.A. § 6206(1). Properties used by Tribes for "governmental purposes" are exempt from taxation by the state to the same extent provided for any such properties owned by municipalities. *Id.* § 6208(2) (1996). Regarding financial aid, not only are the Tribes "eligible to receive

all of the financial benefits which the United States provides to Indians," 25 U.S.C.A. § 1725(i) (West 1983 & Supp. 2000), but they are also eligible to receive financial assistance from the state as a municipality of the state, 30 M.R.S.A. § 6211(1) (1996).

[¶ 39] At the same time, however, exceptions to the municipal model were clearly anticipated by both parties. Some exceptions are set out without ambiguity. For example, in contrast to municipalities, the Tribes have retained exclusive jurisdiction over certain juvenile, civil, criminal, and domestic relations matters. 30 M.R.S.A. §§ 6209-A, 6209-B (1996 & Supp. 2000); 25 U.S.C.A. § 1727 (West 1983) (granting tribal courts exclusive jurisdiction over Indian child custody proceedings pursuant to Indian Child Welfare Act of 1978). Judgments from those proceedings are granted full faith and credit, 25 U.S.C.A. § 1725(g) (West 1983), and are not subject to principles of double jeopardy in state courts. *See State v. Mitchell*, 1998 ME 128, ¶ 6, 712 A.2d 1033, 1034. The Tribes have the exclusive power to regulate certain aspects of the fishing and wildlife resources within their territories, 30 M.R.S.A. § 6207(1) (1996), a power not delegated to municipalities. The Tribes also have the power to create tribal school committees, distinct from the committees established by the laws of Maine, 30 M.R.S.A. § 6214 (1996), but regulated in a similar fashion.

[¶ 40] Other exceptions to the municipal model recognize that the Tribes may take on roles that are distinct from municipal or governmental roles. In courts, the Tribes may generally sue and be sued to the same extent as "any other entity or person." 30 M.R.S.A. § 6206(2). When a Tribe acts in its business capacity, rather than in

its governmental capacity, it is deemed to be a "business corporation organized under the laws of the State." *Id.* § 6208(3) (1996). When acting in its "business capacity as distinguished from its governmental capacity," a Tribe is taxed to the same extent as any other corporation. *Id.*; *cf. Couturier*, 544 A.2d at 309 n.6 (explaining that the Maine Tort Claims Act, which ordinarily applies to municipalities, does not apply to the Tribes when acting in their business capacities). With regard to the federal government, the Tribes are recognized as sovereign "Indian tribes" entitled to receive federal funding available to other such tribes, but not subject to the full measure of control Congress has generally exercised over similar Indian tribes. *See* 25 U.S.C.A. § 1725; *cf. Akins*, 130 F.3d at 489-90; *Passamaquoddy Tribe*, 75 F.3d at 794.

[¶ 41] Thus, depending on the circumstances and activity engaged in by a Tribe, it may be recognized as a sovereign nation, a person or other entity, a business corporation, or a municipal government. *See, e.g.*, 19-A M.R.S.A. § 2802(19) (1998 & Supp. 2000) (defining a Tribe as a sovereign "state" for purposes of the Uniform Interstate Family Support Act); 17 M.R.S.A. § 314-A (Supp. 2000) (granting the Tribes the right to obtain licenses to operate high-stakes beano). Designation of the capacity in which the Tribes act is, therefore, a necessary first step in the determination of the laws applicable to those actions.

[¶ 42] Accordingly, when it is asserted that a state law is applicable to the Tribes, our analysis proceeds as follows: (1) to what entities does the statute at issue apply; (2) are the Tribes acting in the capacity of such entities; (3) if so, does the Maine Implementing Act expressly prohibit the application of the statute to the

Tribes generally; (4) if not, does the Maine Implementing Act prohibit or limit the application of the statute in the circumstances before the court. Here, the paper companies have asserted that the Freedom of Access Act is fully applicable to the Tribes. We turn then to our first enquiry: to what entities does the Freedom of Access apply.

C. The Maine Freedom of Access Act

[¶ 43] By enacting the Freedom of Access Act, the Legislature has declared that "public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly." 1 M.R.S.A. § 401 (1989). The provisions of the Act apply to all "public proceedings." *Id.* Public proceedings are defined for purposes of our analysis as "the transactions of any functions affecting any or all citizens of the State by . . . [a] municipality." *Id.* § 402(2)(C) (1989 & Supp. 2000). The Freedom of Access Act does not create any exceptions to the application of the Act to the Tribes.

[¶ 44] Preliminarily, therefore, we must determine whether the Tribes are acting in their municipal capacities in the matter before us. We conclude that they are. The information sought by the paper companies relates to the Tribes' interactions, or "transaction[s]," with the federal government regarding the regulation of water quality within or adjacent to their territories. *See id.* § 402(3). Through their communications with the federal government, the Tribes have sought, inter alia, an approval to be

treated like a "state," thus excluding the State of Maine from exercising authority over those portions of the rivers that are within or adjacent to their lands. *See* 33 U.S.C.A. § 1377(e). They do so not as businesses or individuals, but in their capacities as the governments of Indian territories in Maine. *Cf. Indian Township Passamaquoddy Reservation Hous. Auth.*, 495 A.2d at 1191-92. In doing so, the Tribes are unquestionably acting in their governmental capacities. The Maine Implementing Act defines their governmental status with regard to the State of Maine as a municipality. 30 M.R.S.A. § 6206(1).[16] The Tribes are therefore subject, in this context, to state laws affecting municipal governments. *See Couturier*, 544 A.2d at 308 (holding that the Maine Tort Claims Act, from which municipalities derive their immunity, applies to the Tribes when acting in their governmental capacity).

[¶ 45] Because the Freedom of Access Act applies to municipal governments and because the Tribes are acting in their municipal capacity, we must next determine whether any provision of the Maine Implementing Act prohibits or limits the application of the Freedom of Access Act to the Tribes generally or as applied to this case.

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[16] Consistent with this relationship, in the past, the Tribes have applied to the State of Maine Department of Environmental Protection, Bureau of Water Quality Control, as municipalities to obtain Waste Discharge Licenses. *See, e.g.*, Municipal Application from Jerry Pardilla, Governor of Penobscot Nation, to State of Maine Department of Environmental Protection (Jan. 29, 1993).

[¶ 46] The Tribes argue that the internal tribal matters exception flatly prohibits any application of the Freedom of Access Act to the Tribes. *See* 30 M.R.S.A. § 6206(1). Specifically, the Tribes assert that because the Act would regulate "tribal government," its application is prohibited by the exception for "internal tribal matters," defined to include tribal government. *See id.* There is no question that the state may not interfere with internal tribal matters. *Id.* The question is whether the application of the Freedom of Access Act would always interfere with internal tribal matters.

[¶ 47] Generally, the Act affects two areas of government action. First, it requires that public proceedings be open to the public. 1 M.R.S.A. § 403 (1989). Second, it requires that the public be given access to all public records. *Id.* § 408 (1989).[17] The paper companies have sought access not only to documents generated by the Tribes as a result of the decisions or actions of tribal government, but also to the minutes of the Tribes' meetings or hearings. *See id.* §§ 402, 403. Thus, both aspects of the Act are implicated here.

[¶ 48] Whether either aspect of the Freedom of Access Act would reach into internal tribal matters

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[17] "Public record" is defined as (1) "any written, printed or graphic matter . . . from which information can be obtained," (2) "that is in the possession or custody of an agency or public official of this State or any of its political subdivisions," and (3) "has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business[.]" 1 M.R.S.A. § 402(3) (1989 & Supp. 2000).

requires an understanding of that term. *Fellencer,* 164 F.3d at 709. "Internal tribal matters" is not defined in the Implementing Act, but includes "membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, *tribal government,* tribal elections and the use or disposition of settlement fund income." 30 M.R.S.A. § 6206(1) (emphasis added). The Committee Report accompanying the bill "To Provide for the Settlement of Land Claims of Indians, Indian Nations and Tribes and Bands of Indians in the State of Maine" described this aspect of the compromise as follows:

> Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes. . . . While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act- . . . the settlement provides that henceforth the Tribes will be free from state interference in the exercise of their internal affairs.

H.R. Rep. No. 96-1353 (1980); *cf.* 22 M.R.S.A. §§ 4701-4836 (dictating the rules and regulations that apply to the Tribes) (repealed in substantial part by Maine Implementing Act, P.L.1979, ch. 732).

[¶ 49] Because the Implementing Act does not define internal tribal matters, giving definition to the term has necessarily fallen to the courts. It has proven to be a complex task. The First Circuit in *Akins* has suggested several factors for consideration in determining whether a disputed issue relates to an "internal tribal matter."

Akins, 130 F.3d at 486-87. While these factors are neither exclusive nor dispositive, they provide a common sense framework for addressing this murky area, referred to by the *Akins* court as "treacherous," in which the state's authority over the Tribes may be curtailed. *Id.* at 487. Those factors include: (1) the effect on nontribal members, (2) & (3) the subject matter of the dispute, particularly when related to Indian lands or the harvesting of natural resources on Indian lands, (4) the interests of the State of Maine, and (5) prior legal understandings. *Id.* at 486-87.

[¶ 50] Applying the *Akins* factors, we conclude that a Tribe's own methods of convening and engaging in government will in most instances be matters "internal" to the Tribe. *See id.* at 487-88, 490 (concluding that the regulation of stumpage permits was an "internal tribal matter" where policy only dealt with tribal members and natural resources within tribal territories). The methods by which the Tribes govern themselves are not matters of interest to the citizenry of the state at large. Tribal government will ordinarily be focused on Indian territory, tribal resources, and members of the Tribe. Moreover, treating the processes of tribal government as free from state interference is entirely consistent with the intent of the settlement acts. *See id.* at 488-89; *see also* 30 M.R.S.A. § 6206(1); *Fellencer*, 164 F.3d at 709-10, 713.

[¶ 51] We need not determine the full parameters of the instances where the Act will not apply to the Tribes. It will suffice to conclude that the Freedom of Access Act is not ordinarily applicable to the methods and actions by

which the Tribes engage in self governance.[18] This conclusion is consistent with the House and Senate committee reports which indicated Congress's understanding that, pursuant to the internal tribal matters exception, the Tribes "may exclude non-Indians from tribal decision-making processes." S. Rep. No. 96-957, at 15 (1980); H.R. Rep. No. 96-1353 (1980).

[¶ 52] Thus, when the Tribes undertake the deliberative processes of self-governance, they are, in most instances, engaged in matters that are "internal tribal matters." *See Stilphen*, 461 A.2d at 489-90. The application of the Freedom of Access Act to such internal tribal affairs would constitute an impermissible imposition of state laws on the Tribes' exclusive right to regulate their "tribal government." 30 M.R.S.A. § 6206(1).

[¶ 53] In the context of this case, the Tribes' internal discussions, votes, and decision-making as to whether they would petition the federal government, and if so, in what manner and to what extent, are processes entirely internal to the Tribes. Neither the state nor the general public has a right to be involved in, or sit in on, that internal decision-making process. Similarly, the methods used to reach the decisions, along with the documents generated in the process, were within the Tribes' authority to create, without interference from the state or the public.

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[18] The Freedom of Access Act would also not apply to the Tribes in instances where they are acting in their corporate or other nongovernmental capacities.

[¶ 54] It is not until the decisions made in the course of tribal governance find their way to actions and interactions with others outside of the Tribes that the Tribes will ordinarily be deemed to have moved outside of internal tribal matters.[19] Cf. *id.* § 6210(3) (1996). When the Tribes, in their municipal capacities, act or interact with persons or entities other than their tribal membership, such as the state or federal government, the Tribes may be engaged in matters that are not "internal tribal matters." *See Stilphen*, 461 A.2d at 488-90.

[¶ 55] We conclude that the effort of the Tribes to obtain a position on a par with state government regarding the regulation of water quality is such an instance. The Maine Implementing Act makes state laws regarding natural resources generally applicable to tribal lands. 30 M.R.S.A. § 6204. The Tribes' efforts would, in many aspects, have a direct effect upon members of the public outside the borders of tribal lands and upon the Tribes' relationships with the state, *see* 33 U.S.C.A. 1377(e), could limit the state's authority, and could affect the state's relationship with federal agencies. The relationship between the state and the Tribes regarding the regulation of water quality within the state is a matter of the legitimate interest of the citizens of this state. Thus, the Tribes' communications with the federal government or the state in the context of their water quality authority are not

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[19] Not all actions affecting non-Indians fall outside the definition of internal tribal matters. *See, e.g., Penobscot Nation v. Fellencer*, 164 F.3d 706, 710 (1st Cir. 1999) (holding that "the decision to terminate Fellencer as the community health nurse [which] affects many tribal members but only one non-tribal member" was an internal tribal matter).

matters "internal" to the Tribes, and are subject to the public records provisions of the Freedom of Access Act. *See* 1 M.R.S.A. § 402(3).[20]

[¶ 56] In sum, because the decisions reached by the Tribes have resulted in actions of a governmental nature that may have a meaningful effect on members of the public who are not members of the Tribes, the provisions of the Freedom of Access Act apply to those actions. *See Stilphen*, 461 A.2d at 480, 490 (holding that operation of beano games, open to the general public and drawing "hundreds of players [to the Tribe] from all over Maine and beyond," was not an internal tribal matter). Thus, when the Tribes communicate with the state or federal government, file documents relating to the dispute of authority at issue, and provide the other governments with information regarding their requests, they are not engaged in "internal tribal matters." *See* 30 M.R.S.A. § 6206(1).

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[20] The Tribes do not contend that the documents that they have submitted to the federal government would not be available from the federal government pursuant to the federal Freedom of Information Act. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1063, 1069-70 (2001) (holding that the documents passed between Indian tribes and the Department of the Interior, which addressed "tribal interests subject to state and federal proceedings to determine water allocations," were available from the Department pursuant to the federal Freedom of Information Act and were not exempt as intra-agency memorandum or letters). *See also Wiggins v. McDevitt*, 473 A.2d 420 (Me. 1984).

[¶ 57] The paper companies, however, have not limited their document requests to the Tribes' communications with other governmental entities. They also seek minutes of tribal council meetings in which any discussion of options or proposals regarding governance of water quality occurred. As we concluded above, although the Tribes' interactions with the state and federal government in this instance do not fall within the exception for internal tribal matters, the council meetings and internal decision-making processes of the Tribes do. *See id.*

III. CONCLUSION

[¶ 58] With the enactment of the Act to Implement the Maine Indian Claims Settlement and the ratification of that Act by Congress, Maine's Indian Tribes agreed to significant limitations on their sovereignty, and agreed to be treated within the State of Maine, not as separate sovereigns, but, generally, as municipalities subject to the laws of Maine. The Tribes accepted those limitations in exchange for assets totalling approximately $81.5 million.

[¶ 59] The Freedom of Access Act applies to all of Maine's municipalities. When the Tribes act in their municipal capacity, they are subject to Maine's laws applicable to municipal governments. No explicit exception to the Act's application to the Tribes is found in the settlement acts or the Freedom of Access Act itself.

[¶ 60] The Tribes are distinct from municipalities, however, in that when they are engaged in internal tribal matters, state laws cannot be imposed on them. Tribes are ordinarily acting with regard to internal tribal matters when they are engaged in the deliberative processes of

self-government. They are not engaged in internal tribal matters when they interact with federal and state governments in efforts to expand or clarify their authority within the framework of the state's competing authority. Thus, in the context of the matter before us, the Freedom of Access Act does not apply to the Tribes in the internal conduct of their governments, but does apply when the Tribes communicate and interact with other governments.

[¶ 61] Accordingly, the Superior Court did not err in requiring the Tribes to turn over copies of their correspondence or documents exchanged with the state or federal government that relate to their efforts to obtain federal recognition as a "state" in water quality matters. We therefore affirm the court's judgment requiring the Tribes to turn over the following: any communications and documents provided to the state or federal government, or documents received from the state or federal government related to:

> 1. efforts by the Tribes to obtain "treatment as a State" status pursuant to section 518 of the Clean Water Act, 33 U.S.C. § 1377(e);
>
> 2. efforts by the Tribes to have the U.S. Environmental Protection Agency adopt water quality standards different from those of the State of Maine for any waters located in the State of Maine; and
>
> 3. any agreements with federal government agencies that relate to the protection or study of water or other natural resources.

[¶ 62] Because the Freedom of Access Act does not apply to the Tribes' internal governmental proceedings, we vacate the judgment to the extent that it required the

Tribes to turn over (1) notices of or agenda from any tribal council meetings; (2) notes taken at any tribal council meetings; or (3) minutes of any tribal council meetings.

[¶ 63] To the extent that any documents sought by the paper companies have not been identified here, the court is authorized on remand to enter any judgment necessary to clarify the Tribes' responsibility under the Freedom of Access Act, consistent with this opinion.

[¶ 64] Because we have altered the class of documents which are required to be turned over by the Tribes, we vacate the judgment of contempt against the Tribes and remand the matter to the Superior Court with instructions to allow the Tribes a reasonable period of time to voluntarily comply with the court's restructured order.[21]

The entry is:

> The Superior Court's judgment, denying the Tribes' motion to dismiss and granting the paper companies' motion for summary judgment, is affirmed in part and vacated in part. The judgment of contempt is vacated.

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[21] In declaring unsettled questions of law, we frequently decline as a matter of comity to summarily enjoin a coordinate branch of government. *See, e.g., Littlefield v. Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982). We operate on the assumption that responsible governmental officials will comply with the law once it is declared. It is appropriate for the courts of Maine to extend this same degree of deference and respect to the representatives of the Penobscot Nation and the Passamaquoddy Tribe.

Remanded for further proceedings consistent with this opinion.

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court

DOCKET NO. Cum-00-573
Decision No. 201 ME 68

Great Northern Paper, Inc., et al.	)	ORDER
v.	)	
Penobscot Nation et al.	)	

Upon Motion for Reconsideration of appellants, Penobscot Nation et al., it is ORDERED that the Motion be, and it hereby is, DENIED. Upon Motion for Stay of Mandate of appellants, Penobscot Nation et al., it is ORDERED that the Motion be, and it hereby is, DENIED.

Dated: May 31, 2001

For the Court

/s/ Leigh I. Saufley
Leigh I. Saufley
Associate Justice

CONSTITUTION OF THE UNITED STATES

ARTICLE I

* * *

Section 8. The Congress shall have power

* * *

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes

* * *

UNITED STATES CODE

TITLE 25– . . . CHAPTER 19– . . .

SUBCHAPTER II – MAINE INDIAN CLAIMS SETTLEMENT

§ 1721. Congressional findings and declaration of policy

(a) Findings and declarations

Congress hereby finds and declares that:

> (1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

* * *

(7) This subchapter represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians with a fair and just settlement of their land claims. In the absence of congressional action, these land claims would be pursued through the courts, a process which in all likelihood would consume many years and thereby promote hostility and uncertainty in the State of Maine to the ultimate detriment of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, their members, and all other citizens of the State of Maine.

* * *

§ 1725. State laws applicable

* * *

(b) Jurisdiction of State of Maine . . . pursuant to the Maine Implementing Act . . .

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

* * *

§ 1731. Other claims discharged by this subchapter

Except as expressly provided herein, this subchapter shall constitute a general discharge and release of all obligations of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians or the United States as trustee therefor, including those actions now pending in the United States District Court for the District of Maine captioned United States of America against State of Maine (Civil action Nos. 1966-ND and 1969-ND).

* * *

§ 1735. Construction

(a) Law governing . . .

In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this subchapter should emerge, the provisions of this subchapter shall govern.

LAWS OF THE STATE OF MAINE
PUBLIC LAWS, 1979, CHAPTER 732

AN ACT to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine

* * *

Sec. 31. Effective date. This Act shall be effective only upon the enactment of legislation by

the United States extinguishing aboriginal land claims and derivative claims of Indians in Maine and discharging all claims in pending litigation brought by the United States against the State on behalf of the Passamaquoddy Tribe and the Penobscot Nation, providing funds for the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians for such extinguishment, and ratifying and approving this Act without modifications. . . .

MAINE REVISED STATUTES ANNOTATED
TITLE 30. . . . PART 4. . . . CHAPTER 601. MAINE INDIAN CLAIMS SETTLEMENT

* * *

§ 6206. Powers and duties of the Indian tribes within their respective Indian territories

1. General powers. Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. The Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to

implement and administer those laws of the State applicable to the respective Indian territories and the residents thereof. Any resident of the Passamaquoddy Indian territory or the Penobscot Indian territory who is not a member of the respective tribe or nation nonetheless shall be equally entitled to receive any municipal or governmental services provided by the respective tribe or nation or by the State, except those services which are provided exclusively to members of the respective tribe or nation pursuant to state or federal law, and shall be entitled to vote in national, state and county elections in the same manner as any tribal member residing within Indian territory.

STATE OF MAINE CUMBERLAND, SS.	SUPERIOR COURT CIVIL ACTION DOCKET NO. CV-00-329
GREAT NORTHERN PAPER CO., et al., Plaintiffs v. PENOBSCOT NATION, et al., Defendants	DEFENDANTS' MOTION TO DISMISS

NOW COME the Defendants, through counsel, and hereby move to dismiss this action for lack of subject matter jurisdiction and because the Plaintiffs' "Complaint Under Maine's Freedom of Access Act" fails to state a claim upon which relief may be granted.

The reasons for this motion are set forth in *Defendants' Consolidated Memorandum of Law in Opposition to Plaintiffs' "Motion for Partial Summary Judgment" and in Support of Defendants' Motion to Dismiss.*[1]

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[1] As set forth in that Memorandum of Law, the Defendants file this motion, as a protective measure, understanding that this Court has not yet had the opportunity to address the Defendants' pending *Motion to Stay Proceedings*. Consequently, this motion is without prejudice to that *Motion to Stay*.

WHEREFORE, Defendants respectfully ask this Court to dismiss this action and enter judgment in their favor.

Date: July 3, 2000 /s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.
Bar Roll No. 3301
Gregory Sample
Bar Roll No. 1860
Counsel for the Penobscot Nation and the Passamaquoddy Tribe

STATE OF MAINE CUMBERLAND, SS.	SUPERIOR COURT CIVIL ACTION DOCKET NO. CV-00-329
GREAT NORTHERN PAPER CO., et al., Plaintiffs v. PENOBSCOT NATION, et al., Defendants	DEFENDANTS' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' "MOTION FOR PARTIAL SUMMARY JUDGMENT," AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

* * *

ARGUMENT

I. Pursuant to the Federal Law Prohibition of State Regulation of Tribal Government Under the Settlement Act, This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' "Complaint Under Maine's Freedom of Access Act" Against the Tribes and their Tribal Governors and Chiefs.

By proceeding against the Tribes in the Maine Superior Court pursuant to MFOAL, the Plaintiffs are seeking to impose state regulation, the provisions of MFOAL, upon tribal government. Defendants' action is prohibited by the Settlement Act, which prohibits state regulation of tribal government. 30 M.R.S.A. § 6206(1), *ratified by* 25 U.S.C. § 1725(b)(1). Pursuant to this provision ("the internal tribal matters provision"), this Court lacks subject matter jurisdiction to proceed under MFOAL against the Tribes and their governing officials. [Footnote Omitted]

Since only Congress, not the states, has plenary authority over Indian tribes, U.S. Const. art. I, § 8, cl. 3;

Montana v. Blackfeet Tribe of Indians, 471 U.S 759, 764 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999), *cert. denied*, 119 S.Ct. 2367, state regulation of Indian affairs and territory has been conditioned upon the express provisions of Congress, *e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-1 (1973). Thus, construction of the internal tribal matters provision is a federal question. *Fellencer*, 164 F.2d at 708. The "unique trust relationship between the United States and the Indians" requires that this prohibition be construed "to comport with the traditional notions of sovereignty and the federal policy of encouraging tribal independence." *Id.* at 709 (citations and quotations omitted). *See Oklahoma Tax Commission v. Sax and Fox Nation*, 508 U.S. 114, 123-24 (1993) ("The Indian sovereignty doctrine, which historically gave state law no role to play within a tribe's territorial boundaries . . . provide[s] a backdrop against which applicable treaties and federal statutes must be read.").

Indeed, upon ratifying the Settlement Act, Congress, through its final committee reports, assured the Tribes that the internal tribal matters provision was "in keeping" with principles of federal Indian law protective of tribal self-government. *See Fellencer* at 708, 712 (quoting S.Rep. No. 96-957, at 14, 29; H.R. Rep. No. 96-1353, at 14-15, *reprinted in* 1980 U.S.C.C.A.N. at 3790, *citing Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064-65 (1st Cir. 1979)). Congress further explained that the Settlement Act "strengthens the sovereignty of" the Penobscot Nation and the Passamaquoddy Tribes by "withdrawing

the power which Maine previously claimed" to have over their affairs, and confirmed the "independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." *See id.* at 708 (1st Cir. 1999) (quoting S.Rep. No. 96-957, at 14, 29; H.R. Rep. No. 96-1353, at 14-15, *reprinted in* 1980 U.S.C.C.A.N. at 3790); S.Rep. No. 96-957 at 14. [Footnote Omitted]

* * *

The federal court, in *Penobscot Nation, et al. v. Georgia-Pacific Corporation, et al.*, Civil No. 00-101-B, is poised to decide whether the Settlement Act's internal tribal matters provision prohibits state regulation of the Tribes under MFOAL. Should this Court decide not to stay proceedings to await that decision, it should deny the Plaintiffs' "Motion for Partial Summary Judgment" and dismiss this case because the internal tribal matters provision prohibits state jurisdiction over the Tribes under MFOAL. Thus, this Court lacks subject matter jurisdiction over Plaintiffs' MFOAL action against the Defendants. Defendants hereby incorporate by reference herein their *Motion for Summary Judgment with Incorporated Memorandum of Law* filed in *Penobscot Nation, et al. v. Georgia-Pacific Corporation, et al.*, Civil No. 00-101-B and attached hereto as *Exhibit* 2. [Footnote omitted] * * *

II. The Plaintiffs' Complaint Under Maine's Freedom of Access Act Fails to State a Claim Upon Which Relief May be Granted.

For reasons similar to those set forth above, this Court should deny the Plaintiffs' "Motion for Partial

Summary Judgment" and dismiss this case because the Plaintiffs' "Complaint Under Maine's Freedom of Access Act" fails to state a claim for which relief may be granted. Defendants again incorporate by reference herein their *Motion for Summary Judgment with Incorporated Memorandum of Law* filed in *Penobscot Nation, et al. v. Georgia-Pacific Corporation, et. al.*, Civil No. 00-101-B and attached hereto as *Exhibit 2*. MFOAL simply cannot give rise to a cause of action against the Tribes or their tribal governors or chiefs. Since Congress, pursuant to the Settlement Act, preserved the inherent sovereignty of the Tribes and confirmed their right to be self-governing without interference by the State of Maine, any attempt to apply MFOAL to the Tribes, including the MFOAL provision that would give rise to this Court's review of the Tribes' "governmental action," is unworkable. *See Exhibit 2* at 9-17.

. . . The Tribes' right to engage in the self-government without state interference, as protected by Congress under the Settlement Act, would be harmed if the state could impose its governmental policies concerning public access to governmental records and processes upon the Tribes. [Footnote Omitted]

Indeed, application of MFOAL's substantive provisions makes no sense in light of the Settlement Act's protection of tribal self-government from state interference; application of that law to the Tribes would amount to paternalistic imposition of the state's assessment of "the public interest" in matters involving access to the workings of tribal government. For instance . . . under MFOAL, the state reserves, for itself, unilateral authority to determine what documents will be exempt from disclosure. *See* 1 M.R.S.A. § 402(3)(A) (exemption for records

designated confidential by statute); *id.* § 408 (general right to public records limited if "otherwise provided by statute"). If applied to the Tribes, this would give Maine unilateral authority to determine the public policy bases for disclosure of tribal records. This would jettison the right of the Tribes, expressly retained under the Settlement Act, to engage in tribal government without preemptive state regulation. [Footnote Omitted]

* * *

In sum, rules about how the governing bodies of the Penobscot Nation or the Passamaquoddy Tribe conduct their meetings . . . and what documents in their custody either tribal members or non-tribal members should have access to – all of the matters that Plaintiffs would purport to have the state regulate under the MFOAL – are matters directly affecting the inner-workings of tribal government. The Settlement Act's internal tribal matters provision unambiguously prohibits such state regulation of tribal government. 30 M.R.S.A. § 6206(1) ("tribal government . . . shall not be subject to regulation by the state), *ratified by* 25 U.S.C. § 1725(b)(1). While Maine once sought to control such matters, *see Murch v. Tomer*, 21 Me. 525, 538 (1842) ("imbecility on their [the Indians] part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man"); *State v. Newell*, 84 Me. 465 (1892) ("They are completely subject to the State as any other inhabitants can be."), the Settlement Act confirms that the Tribes are free from such state domination.

For these reasons, MFOAL simply cannot apply to the Penobscot Nation and the Passamaquoddy Tribe. Thus, the Plaintiffs' "Complaint Under Maine's Freedom of Access Act" against the Defendants fails to state a claim upon which relief may be granted.

* * *

CONCLUSION

For all of the above reasons, Plaintiffs' Motion for Partial Summary Judgment" must be denied and this Court should dismiss this action for lack of jurisdiction and failure to state a claim for relief.

Dated: July 3, 2000 /s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.
Bar Roll No. 3301

Dated: July 3, 2000 /s/ Gregory W. Sample
Gregory W. Sample
Bar Roll No. 1860

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* * *

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT NATION and PASSAMAQUODDY TRIBE Plaintiffs, v. GEORGIA-PACIFIC CORPORATION GREAT NORTHERN PAPER, INC. and CHAMPION INTERNATIONAL CORPORATION Defendants	)	Civil No. 00-101-B

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

The Penobscot Nation and the Passamaquoddy Tribe (the "Tribes") hereby move for summary judgment against the Defendants. For the reasons set forth below, the Tribes are entitled to summary judgment on their Complaint against defendants for declaratory and injunctive relief. The Tribes, therefore, respectfully request the Court to enter judgment in their favor, together with an order (a) declaring that the protections from state regulation of tribal government under the Maine Indian Claims Settlement Act of 1980 prohibit application of Maine's Freedom of Access Law, 1 M.R.S.A. §§401-410 ("MFOAL") to the Tribes and (b) enjoining Defendants from proceeding against the Tribes under that law. [Footnote omitted]

* * *

ARGUMENT

I. BACKGROUND

A. Introduction

This case presents the federal law issue of whether the Penobscot Nation and the Passamaquoddy Tribe, given protections to their right of tribal self-government under the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (the "Settlement Act") are subject to state regulation under MFOAL. The Settlement Act prohibits state regulation of the Tribes' "internal tribal matters, including . . . tribal government." 30 M.R.S.A. § 6206(1), *ratified by* 25 U.S.C. § 1725(b)(1). The First Circuit has made clear that this provision (the "internal tribal matters provision") must be construed in accordance with established canons of statutory construction protective of tribal independence. *Penobscot Nation v. Fellencer;* 164 F.3d 706, 709 (1st Cir. 1999) (citing *County of Oneida v. Oneida Indian Nation of New York,* 470 U.S. 226, 247 (1985); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143-44 (1980)). "Traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." *White Mountain Apache Tribe,* 448 U.S. at 143. While the Tribes view application MFOAL to them to be direct and obvious state regulation of tribal government in violation of the internal tribal matters provision, they initially set forth this "backdrop" and the historical underpinnings of the Settlement Act, which must anchor any decision on the issue. *Id.; Fellencer,* 164 F.3d at 709, 712.

B. The Legal "Backdrop" and Maine Indian Claims Settlement Act of 1980

The United States Constitution vests Congress with plenary power over Indian affairs. *See* U.S. Const. art. I, § 8, cl. 3; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Congress's laws and treaties pertaining to Indian tribes constitute the "supreme law of the land." U.S. Const. art. VI, cl.2. Federally recognized Indian tribes have the "inherent powers of a limited sovereignty which has never extinguished." *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065 (1st Cir. 1979) (citation, quotations, and emphasis omitted). While subject to complete defeasance by Congress, this inherent sovereignty includes the right to regulate the tribal affairs free from state or local control. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).[2]

Early in this country's history, the Supreme Court held that the federal government had a trust obligation to protect tribal authority from state encroachment. *See*

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[2] The Supreme Court has clarified other aspects of tribes' inherent sovereignty, which are retained by tribes unless expressly divested by Congress. Tribes have "inherent sovereignty authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332; *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. They also have inherent "authority over the activities of non-Indians" within their reservations. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333. "A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established." *Id.*

* * *

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832); *State of Washington Dept. of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1470 (9th Cir. 1985). *See generally* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) (hereinafter "Cohen") at 234-35 (The trust "relationship not only preserved tribal government, but insulated it from state interference."). Since only Congress has the power to limit the inherent authority of Indian tribes, state regulation of tribes has been conditioned on the express provisions of Congress. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973); *Williams v. Lee*, 358 U.S. 217, 223 (1959).

* * *

In 1980, Congress enacted the Maine Indian Claims Settlement Act, ending the lands claim litigation, and confirming federal recognition of the Penobscot Nation and the Passamaquoddy Tribe. *See* 25 U.S.C. §§ 1722(h), 1722(k). Federal recognition confirmed the inherent sovereignty of these tribes, *Talton v. Mayes*, 163 U.S. 376 (1896); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994) (federal recognition confirms tribe's inherent sovereignty, predating both federal recognition and "the birth of the Republic"), leaving intact all aspects of that sovereignty not expressly divested by Congress. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). *See Narragansett Indian Tribe*, 19 F.3d at 701-02 (attributes of tribal sovereignty cannot be lost "through implicit divestiture") (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978));

Bottomly, 599 F.2d at 1066 (quoting *Wheeler*, 435 U.S. at 322-23).

Pursuant to the Settlement Act, Congress expressly divested the Penobscot Nation and the Passamaquoddy Tribe of certain significant attributes of their sovereignty – most notably, their sovereign immunity from suit and freedom from of state jurisdiction over crimes committed by Indians on their reservations. *See* 25 U.S.C. §§ 1725(c); 1725(d)(1). [Footnote Omitted] In addressing the power granted to Maine over these two tribes, however, Congress did not speak with express clarity. *See, e.g., Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) (other than enumerated prohibitions against state regulation of tribal government and other listed examples of "internal tribal matters," statute provides "limited guidance" for understanding scope of state regulatory authority over tribes). *Accord Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999), *cert. denied*, 119 S.Ct. 2367.

Pursuant to 25 U.S.C. § 1725(a), with limited exceptions, Congress granted the State of Maine broad authority over Maine tribes, "**other than the Passamaquoddy Tribe and the Penobscot Nation.**" 25 U.S.C. § 1725(a) (emphasis added). For these latter two tribes, Congress expressly recognized (and did not divest) numerous aspects of their inherent sovereignty. *E.g.* 25 U.S.C. § 1725(f) (recognition of tribes' civil and criminal jurisdiction "separate and distinct" from the State of Maine); 25 U.S.C. § 1725(e)(1) (recognizing potential for "concurrent jurisdiction" between state and tribes); 25 U.S.C. § 1724(h) (tribal management of lands and natural resources in accordance with federal law). The clearest statement on the scope of Maine's regulatory authority

over the Tribes was an express prohibition. By ratifying the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214, Congress provided that "internal tribal matters, including tribal organization [and] tribal government . . . **shall not be subject to regulation by the State,**" 25 U.S.C. § 1725(b)(1), *ratifying* 30 M.R.S.A. § 6206(1) (emphasis added).

The scope of Maine's power over the Tribes under the Settlement Act was of central concern to the Penobscot Nation and the Passamaquoddy Tribe. On the eve of enactment, the Tribes expressed fear that Maine would be granted powers that would destroy their "sovereign rights and jurisdiction." S.Rep. No. 96-957, 96th Cong. 2d Sess. at 14; H.R.Rep. No. 96-1353, 96th Cong., 2d Sess. at 14, *reprinted in* 1980 USCCAN at 3790. Congress, through the final Committee Reports of both the House and the Senate, assured the tribes that this fear was "unfounded," *id.*; S.Rep. No. 96-957, *supra*, at 14; *see Fellencer*, 164 F.3d at 708 ("Both the House and the Senate sought to assuage the [Penobscot] Nation's fears that the settlement undermined its sovereignty."). Addressing the concern as a "Special Issue," the reports stated:

> Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that **the Maine Tribes still possess inherent sovereignty to the same**

> **extent as other tribes in the United States.** The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory . . . , **in keeping with these decisions the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs.** Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.

S.Rep. No. 96-957, *supra.* at 14; H.R.Rep. No. 96-1353 at 14-15, *reprinted in* 1980 USCCAN at 3790 (emphasis added). *See Fellencer,* 164 F.3d at 708 (quoting from same). The Senate Report went on to state that the Settlement Act recognized "**the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.**" S.Rep. No. 96-957 at 29 (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978)) (emphasis added). [Footnote Omitted]

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It is against this backdrop and history that this Court must consider the issue of whether the Tribes are subject to state regulation under MFOAL. *See Oklahoma Tax Com'n v. Sax and Fox Nation,* 508 U.S. at 123-24; *White Mountain Apache Tribe,* 448 U.S. at 143. This is a question of federal law. *Fellencer,* 164 F.3d at 709; *Akins,* 130 F.3d at

485. The Settlement Act's prohibition of state regulation of "internal tribal matters . . . including tribal government" must be "construed liberally in favor of" the Tribes with any ambiguity "interpreted to their benefit." *County of Oneida v. Oneida Indian Nation*. 470 U.S. 226, 247 (1985) (citations omitted). *Accord Fellencer*, 164 F.3d at 709. And it must be construed to comport with the federal policy encouraging tribal independence and self-government. *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130, 152 (1982). *Accord Fellencer*, 164 F.3d at 709 ("These special canons of construction are employed in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence.") (citations and quotations omitted). For the reasons set forth below, it is clear that regulation of the Tribes pursuant to MFOAL would violate their Settlement Act right to be free of state regulation over tribal government.

II. APPLICATION OF MFOAL TO THE TRIBES IS PROHIBITED BY THE INTERNAL TRIBAL MATTERS PROVISION OF THE SETTLEMENT ACT.

A. The Tribes are Not Political Subdivisions of the State of Maine.

Defendants assert that by virtue of the first phrase of 30 M.R.S.A. § 6201(6), which imposes upon the Tribes the legal duties and obligations of Maine municipalities, the Tribes must be deemed political subdivisions of the State of Maine and thereby subject to MFOAL. [Footnote Omitted] The imposition of certain municipal-type duties, obligations, and liabilities upon the Tribes (e.g., provision of municipal services and tort liabilities in accordance

with the Maine Tort Claims Act) is a far cry from establishing them as creatures of the State of Maine. The latter is a legal impossibility.

The Settlement Act both recognizes, and expressly protects, the sovereign identity of the Penobscot Nation and the Passamaquoddy Tribe as federal Indian tribes. As stated above, federal recognition confirms all aspects their inherent sovereignty, which remain intact unless expressly divested by Congress. The Constitution gives plenary authority over Indian affairs to Congress, not to the State of Maine. Hence, Congress's intent under the Settlement Act, which ratified the Maine Implementing Act, controls over the latter, 25 U.S.C. § 1735(a); the relationship between the Tribes and the State of Maine cannot be changed without the Tribes' express consent, and only with regard to subjects delineated by Congress, 25 U.S.C. § 1725(e)(1); the Tribes have jurisdiction over civil and criminal matters "separate and distinct" from the State of Maine, 25 U.S.C. § 1725(f); they have exclusive jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act, 25 U.S.C. § 1727; and state control over their "internal tribal, matters, . . . including tribal government" is expressly prohibited, 30 M.R.S.A. § 6206(1), *ratified by* 25 U.S.C. § 1725(b)(1). None of these attributes could describe a political subdivision of the State of Maine. *See also State v. Mitchell*, 712 A.2d 1033, 1035 (Me. 1998) (while "the Passamaquoddy Tribe is treated as a municipality of the State for some purposes, . . . [t]he State and Federal Acts did not simply give the Tribe the power to enforce State law; they explicitly recognized the inherent authority of the Tribe to prosecute certain crimes that occur on tribal land.")

The controlling final Senate Committee Report stated that the Settlement Act recognized "the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing" in accordance with the principles of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). S.Rep. No. 96-957, *supra*, at 29 (citing *Martinez*); *Fellencer*, 164 F.3d at 708. Thus, in *Akins v. Penobscot Nation*, the First Circuit applied *Martinez* in holding that the source of "constitutional rights" against the Penobscot Nation was not the federal Constitution, but the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301-1303 ("ICRA"). *Akins*, 130 F.3d at 486 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). The Penobscot Nation, like other federal Indian tribes, is not subject to the provisions of the Constitution that constrain the powers of states or their political subdivisions. *See id.* This is because the sovereign authority of Indian tribes "pre-exist[ed] the Constitution." *Martinez*, 436 U.S. at 56-57. Constraints on that authority, similar to those found in the Bill of Rights and the Fourteenth Amendment, are imposed upon tribes by Congress under ICRA, which is enforceable by Indians or non-Indians in tribal courts. *Id.* at 64-66.

* * *

In short, Defendants' assertions that the Tribes are subject to MFOAL as political subdivisions of Maine is wrong. The Tribes are not Maine municipalities; they have independent sovereign existence separate and apart from Maine. As the authoritative treatise of Ninth Circuit Judge William C. Canby, Jr. succinctly states:

> [A] a tribe is quite unlike a city or other subdivision of a state. When a question arises as to the power of a city to enact a particular regulation,

> there must be some showing that the state has conferred such power on the city; the state, not the city, is the sovereign body from which the power must flow. A tribe, on the other hand, is its own source of power.

William C. Canby, Jr., *American Indian Law* (West 1998) 72.

B. The Settlement Act's Internal Tribal Matters Provision Protects The Independent, Self-Governing Authority of the Penobscot Nation and the Passamaquoddy Tribe, Free from the Controls that the State Imposes Upon Its Own Political Subdivisions.

Since the Tribes are not political subdivisions of the State of Maine and tribal government is expressly protected from state regulation under the Settlement Act's "internal tribal matters" provision, it is clear that a state law designed to regulate the governmental workings the State's political subdivisions can have no force within the Penobscot Nation and the Passamaquoddy Tribe. Otherwise, the notion of "tribal government" would be sterile. Congress's pointed assurance that the Tribes would have no reason to fear the loss of their "sovereign rights and jurisdiction" would be completely hollow. *See* S.Rep. No. 96-957, *supra.* at 14; H.R.Rep. No. 96-1353 at 14-15, *reprinted in* 1980 USCCAN at 3790. The scope of "tribal government," afforded protection by the internal tribal matters provision must be given a broad construction. *See Fellencer,* 164 F.3d at 709. The First Circuit's recent decisions construing the provision leave no doubt that it must protect the independent, self-governing authority of the Tribes in accordance with federal law.

The First Circuit made clear, in both *Akins* and *Fellencer* that Congress understood the Tribes to possess self-governing authority in accordance with the principles set forth in *Santa Clara Pueblo v. Martinez*, 463 U.S. 49 (1978). *Martinez* addressed whether the ICRA could be enforced against tribal officials outside of tribal forums. The Supreme Court held that the civil rights protected by the ICRA, for both Indians and non-Indians alike, must be determined in tribal forums. *Id.* at 64-66. After clarifying that tribes are not constrained by the provisions of the Constitution applicable to states and their political subdivisions, *id.* at 56, the Court held that the nature and scope of ICRA as a constraint upon the power of tribal governments was for the tribes to decide for themselves, in the context of the tribal polity. *Id.* at 64-66, 72. To hold otherwise, the Court explained, would undermine the authority of tribes to be self-governing. *Id.* at 60, 72.

In *Fellencer,* the First Circuit also explained that the final committee reports of Congress showed that Congress intended the internal tribal matters provision to protect the self-governing authority of the Tribes "in keeping" with principles articulated in *Bottomly v. Passamaquoddy Tribe. Penobscot Nation v. Fellencer,* 164 F.3d at 712. While the issue in *Bottomly* was whether the Passamaquoddy Tribe had sovereign immunity from suit, the First Circuit addressed Maine's asserted control over tribal self-government *en route* to its conclusion that the Passamaquoddy Tribe, like other Indian tribes, enjoyed sovereign immunity. *See Bottomly v. Passamaquoddy Tribe,* 599 F.2d at 1064-66. The state argued that the Maine tribes, unlike the "fierce warring tribes of the frontier,"

had lost their inherent, self-governing authority by acquiescing to long-term domination by Maine and Massachusetts. *Id.* at 1064. The First Circuit soundly rejected that view, stating that it "fundamentally misconceives basic principles of federal Indian law." *Id.* at 1065. The Court explained that a state cannot divest a tribe of its inherent power as a separate sovereignty. *See id.* at 1066. Thus, Maine's historical involvement with the Passamaquoddy Tribe could not divest the Tribe of its inherent sovereign immunity from suit. *Id.*

Since Congress intended to the Settlement Act to protect the self-governing authority of the Penobscot Nation and the Passamaquoddy Tribe in accordance with the principles articulated in *Martinez,* state regulations that would infringe upon the right of the Tribes to develop, for themselves, the terms under which they open their governmental workings to the public cannot apply to these Tribes. *See Santa Clara Pueblo v. Martinez,* 436 U.S. at 60, 72 (tribal self-government requires that a tribe be allowed to exercise its authority "as a . . . politically distinct entity"). Likewise, since Congress intended the Tribes' immunity from state control under the Settlement Act's internal tribal matters provision to be in keeping with principles enunciated in *Bottomly,* that provision must operate to protect the **independent** authority of the Tribes over their governmental affairs. That authority would have no substance if the state could dictate for the Tribes the rules under which they must provide individuals with access to tribal governmental proceedings and documents. *See Bottomly,* 599 F.2d at 1066 (Maine's asserted domination of the Passamaquoddy

Tribe could not destroy its independent sovereign identity).

C. Application of Maine's Freedom of Access Law to the Tribes Would Violate the Settlement Act's Prohibition of State Regulation of their Internal Tribal Matters by Interfering with the Right of the Tribes To Govern Themselves.

It is self-evident that the independent, self-governing authority of the Penobscot Nation and the Passamaquoddy Tribe would be impaired if the State of Maine had regulatory authority over the terms under which the Tribes provide access to their governmental documents and decision-making processes. Maine's Freedom of Access Laws, like the federal Freedom of Information Act, 5 U.S.C. § 552 (1997) ("FOIA") and other "right to know" laws, involve fundamental issues of governmental policy-making: on what terms may individuals access the inner workings of government. *See, e.g., Summers v. Department of Justice,* 140 F.3d 1077, 1080 (D.C.Cir. 1998) (exemptions to disclosure under FOIA reflect concerns about harm to "legitimate governmental . . . interests"); Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values,* 33 Emory L.J. 649 (1984) (describing enactment of FOIA and significant governmental and public policy issues underlying the law); *Note: Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; or, Perhaps Both,* 44 Duke L.Rev. 1183 (1995) (FOIA allows electorate to obtain "information about

internal government operations" in furtherance of "democratic self-rule"). Such laws reflect particular governmental values. Indeed, Congress, for its own policy reasons, chose to exempt itself from FOIA. *See* 5 U.S.C. § 551(1)(A). And Maine reserves the right to exempt any disclosure of its documents by statute. *See* 1 M.R.S.A. §§ 402(3)(A), 408. In short, such laws involve the self-conscious "experiment" of governing.[7]

Rules about . . . what documents in their custody either tribal members or non-tribal members should have access to – all of the matters that Defendants would purport to have the State of Maine regulate under the MFOAL – are matters directly affecting the inner-workings of tribal government. The Settlement Act's internal tribal matters provision unambiguously prohibits such state regulation of tribal government. 30 M.R.S.A. § 6206(1) ("tribal government . . . shall not be subject to regulation by the state), *ratified by* 25 U.S.C. § 1725(b)(1).

* * *

While the Maine Implementing Act, as ratified by Congress, renders the Tribes subject to suit in state court for torts on the same terms as Maine municipalities, and imposes upon the Tribes the general obligations and

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[7] District of Columbia Circuit Court of Appeals Judge Patricia M. Wald has characterized the federal government's experiment with FOIA as "a chronicle of the perils and problems of translating rhetoric into performance: a kind of morality play, if you will, about how to deal with the baggage that most significant 'freedoms' carry with them, their costs in budgetary as well as human terms, and their vulnerability to shifts in political power and ideologies." Wald, *supra* at 649.

duties of municipalities, including the provision of municipal services to non-members who reside within their territories, *see* 30 M.R.S.A. § 6206(1), it does not strip them of self-determination as sovereign governments. It does not strip them of their right to determine how the inner workings of their governments will be conducted or exposed to the public. [Footnote Omitted] That right is affirmatively protected by the Settlement Act's prohibition of state regulation of "internal tribal matters, . . . including tribal government." Thus, state regulation of public access to tribal government matters pursuant to the MFOAL is prohibited by the plain terms of the Settlement Act. [Footnote Omitted]

* * *

CONCLUSION

For all of the above reasons, the Tribes are entitled to summary judgment. The Court should therefore enter judgment in their favor, and issue an order (a) declaring that the Tribes are not subject to MFOAL and (b) enjoining Defendants from proceeding further against the Tribes under that law.

Dated: June 12, 2000

/s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.

Dated: June 12, 2000

/s/ Gregory W. Sample
Gregory W. Sample

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STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action
Docket No. CV-00-329

GREAT NORTHERN PAPER, INC., GEORGIA PACIFIC CORPORATION and CHAMPION INTERNATIONAL CORPORATION,

Plaintiffs,

v.

THE PENOBSCOT INDIAN NATION, RICHARD HAMILTON, THE PASSAMAQUODDY TRIBE, RICHARD M. DOYLE and RICHARD STEVENS

Defendants,

and

STATE OF MAINE,

Intervenor.

DECISION AND ORDER

FACTUAL BACKGROUND

Plaintiffs, three paper companies, own and operate pulp and paper mills that discharge treated wastewater into rivers upstream and downstream of the Penobscot Indian Reservation and downstream of the Indian Township Reservation of the Passamaquoddy Tribe. All three companies hold federal and state discharge licenses that authorize the wastewater discharges.

On May 10, 2000, Plaintiffs sent written requests to the Penobscot Nation and Passamaquoddy Tribe (collectively referred to as "Tribes") to inspect documents pursuant to the Freedom of Access Act ("FOAA"), 1 M.R.S.A. §§ 401-52. Specifically, the Plaintiffs sought materials related to

(1) the regulation of water resources within Penobscot Indian Territory and in adjacent waters, including the Penobscot River,

(2) the State's application to obtain delegation of permitting authority under the Clean Water Act's National Pollutant Discharge Elimination system program,

(3) the Tribes' alleged authority to regulate water resources within or adjacent to Indian territory,

(4) the Tribes' efforts to obtain "treatment as a State" status pursuant to the Clean Water Act,

(5) the Tribes' efforts to have the Environmental Protection Agency adopt water quality standards different from those of Maine, and

(6) agreements with federal government agencies relating to the protection or study of water.

The Tribes replied on May 18, 2000, stating that the FOAA is not applicable because applying the FOAA to the Passamaquoddy Tribe and Penobscot Nation would constitute state interference with internal tribal matters. They also claimed that the documents were privileged because the Tribes are or will be involved in litigation

regarding use of the waters in the Indian territory and the papers are privileged litigation records.

Plaintiffs filed a complaint in the Superior Court against Defendants on May 22, 2000 alleging that the failure to allow Plaintiffs to inspect and copy all requested records violated FOAA. Plaintiffs moved for partial summary judgment on the issue of whether the Defendants must disclose those records that are responsive to the Plaintiffs' FOAA requests. Defendants moved to dismiss on the ground that this Court lacks subject matter jurisdiction because the Defendants are protected from state regulation pursuant to the Maine Indian Claims Settlement Act of 1980.

DISCUSSION

I. Jurisdiction

Pursuant to the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-35 (1995) ("Settlement Act") and the Maine Implementing Act, 30 M.R.S.A. §§ 6201-14 (1996 & Supp. 1999) ("Implementing Act"), the Passamaquoddy Tribe and Penobscot Nation expressly agreed to be subject to the laws of Maine. *See* 25 U.S.C. § 1725; 30 M.R.S.A. § 6204. "Internal tribal matters," such as tribal membership, the right to reside in Indian territory, tribal organization, tribal government, tribal elections and the use of the settlement fund, however, are not subject to regulation by the State. *See* 30 M.R.S.A. § 6206(1).

The Tribes rely on *Penobscot Nation v. Fellencer,* 164 F.3d 706, 708 (1st Cir. 1999) to argue that interpretation of the phrase "internal tribal matters" lies solely in the

hands of federal courts. *Fellencer,* unlike this case, did not involve direct application of Maine laws to the tribes. Instead, it involved whether the decision of the Tribal Council to terminate the employment of a community health nurse was an "internal tribal matter." *See id.* at 713. Although in *Fellencer* the First Circuit noted that the meaning of the phrase "internal tribal matters" raises a question of federal law, nowhere in that case is it asserted that state courts do not have the power to interpret this phrase. *See id.* at 708. In fact, the internal matters exception has been interpreted by the Law Court. *See Penobscot Nation v. Stilphen,* 461 A.2d 478, 489 (Me. 1983), *appeal dismissed for want of a substantial federal question,* 464 U.S. 923 (1983).

Nearly identical to this case, it was argued in *Stilphen* that the Penobscot Nation's beano games were not subject to State regulation because they involved an internal tribal matter. *See id.* at 481. The Law Court, in interpreting the phrase "internal tribal matters" to find that using beano funds for tribal government purposes did not render beano an internal tribal matter, held the direct attempt by the State of Maine to enforce its laws against the Penobscot Nation valid. *See id.* at 489. It is clear that, although the Tribes may have an "internal tribal matters" defense to the FOAA claim, this Court does not lack jurisdiction to hear the suit.

II. Applicability of FOAA

Pursuant to 1 M.R.S.A. § 408 (1989), "every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or

location of such record." "Public records" are defined as any written, printed or graphic matter from which information can be obtained that is

> in the possession or custody of an agency or public official of this State *or any of its political subdivisions* . . . and has been received and prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business . . .

1 M.R.S.A. § 402(3) (1989 & Supp. 1999) (emphasis added).

The Tribes argue that because their governmental deliberations and undertakings are those of separate sovereigns under the Settlement and Implementing Acts, they cannot be political subdivisions of the State and therefore FOAA cannot apply. The Tribes, however, have failed to recognize the special relationship between the Tribes and the State of Maine pursuant to the Implementing Act.

The relationship between the Tribes and the State of Maine as created by the Settlement and Implementing Acts did not confer upon the Tribes the status of an independent nation. Section 1725(b)(1) of the Settlement Act states that the Tribes "shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act." According to 30 M.R.S.A. § 6204, the Tribes and the State of Maine expressly agreed that, with very limited exceptions, all Indians, Indian nations and tribes "shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State."

According to 30 M.R.S.A. § 6206(1), the Tribes

> shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

Explained another way, when the Tribes function as municipalities of Maine they are reachable under state and federal law, but when they function as a tribe as to internal matters they are not. *See Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997). This distinction illustrates that the terms tribal government and internal tribal matters are not necessarily synonymous.

For purposes of FOAA, the Tribes' designation as a municipality when acting in a governmental capacity confers upon them the status of a "political subdivision." *See Couturier v. Penobscot Indian Nation*, 544 A.2d 306, 307 (Me. 1988) (holding that the term "governmental entity" under the Maine Tort Claims Act, which encompasses "political subdivisions," includes the Penobscot Nation when acting in a governmental capacity). While a definition of political subdivision is not provided in FOAA, it is defined elsewhere to include municipalities. *See* 30-A M.R.S.A. § 2252 (1996). FOAA, therefore, may be applied to the Tribes when they are functioning like municipalities.

III. The "Internal Tribal Matters" Exception

In this case, the Plaintiffs' FOAA requests do not infringe upon the Tribes' "internal matters." According to 30 M.R.S.A. § 6206 (1), the Tribes are subject to all the duties and liabilities of a municipality and subject to the laws of the state unless the subject is an "internal tribal matter." The Settlement acts do not define this phrase. *See Francis v. Pleasant Point Passamaquoddy Housing Authority*, 1999 ME 164, ¶ 7, 740 A.2d 575, 577. The relationship between Maine and the Maine tribes is different from that between other states and their natives; here, the relationship is governed only by the Maine and federal laws approving the settlement. *See Akins*, 130 F.2d at 483 ("[w]hile defining what constitutes an internal matter controlled by Indian tribes is hardly novel in Native American law, it is novel in this context"). Excepting tribes from state regulation for internal tribal matters was intended to protect "certain areas of particular cultural importance." *Stilphen*, 461 A.2d at 490.

The subject matter of the records requested under FOAA relates to efforts by the Tribes to regulate natural resources of the State and to obtain authority over these resources, not the inner-workings of the tribes. That regulation of water resources is not an internal tribal matter is also consistent with previous interpretations of this phrase. In *Stilphen*, the Law Court noted that by the very nature of the matters listed as internal matters in § 6206(1), "action by the Nation *directly* affecting [the listed matters] would not tend to bring the Nation into conflict with state laws of general application." *Stilphen*, 461 A.2d at 489 (emphasis added). That Court went on to

hold that operating illegal beano games was not consistent with the listed terms and therefore was not an internal tribal matter. *See id.* Applying that reasoning to this case, it is clear that the Tribes' attempted regulation of water resources that are deemed to be subject to the laws of the state under the Implementing Act would tend to bring the Tribes directly into conflict with state laws protecting Maine waters. *See* 38 M.R.S.A. §§ 401 *et seq.*

In *Akins*, the First Circuit set forth five factors for consideration in determining whether particular subjects are "internal tribal matters." *See Akins*, 130 F.3d at 486-87. They are whether

(1) the tribal activity purports to regulate only members of the tribe

(2) the tribal activity concerns lands acquired with federal funds

(3) the tribal activity affects the Tribes' ability to regulate its natural resources

(4) the tribal activity does not implicate or impair an interest of the state of Maine

(5) a finding of internal tribal matters is consistent with prior legal understandings

The application of these factors weighs in favor of finding regulation of water resources not to be an internal tribal matter. First, it is clear that water regulation affects both members and non-members of the Tribes. Grouping the second and third factors together, although water regulation concerns lands acquired with federal funds and affects the Tribes' ability to regulate its natural resources, it also affects lands and the regulation of natural resources outside Indian Territory. In *Akins*, the First

Circuit held that issuance of stumpage permits was an internal tribal matter in part because it concerned only lands acquired with federal funds and such activity affected the Tribes' ability to harvest natural resources from the land. *See id.* This case is clearly distinguishable from *Akins,* however, because stumpage permits would not have an effect on lands outside Indian Territory. Unlike lumber, water does not consist of stable, non-moving particles. Instead, water is a constantly flowing substance and will affect other lands and waters not in Indian Territory.

The fourth factor also supports a conclusion that the records production is not an interference in internal tribal matters because the activity of water regulation definitely implicates and impairs an interest of the state of Maine. Currently, pollution control and regulation of discharge into the water is within the power and control of the federal government and the state of Maine. Any efforts by the Tribes to regulate water resources, obtain "treatment as a State" status, or adopt water standards different from those of Maine would impair Maine's interest in pollution control.

Finally, a finding of internal tribal matters would not be consistent with prior legal understandings as to the relationship between the state of Maine and the Tribes. By virtue of the Implementing Act, the Tribes and their natural resources are subject to Maine environmental protection laws. *See* 30 M.R.S.A. 6204. To find otherwise is to disregard that the statute and case law hold the Tribes to be subject to the laws of the State. *See* 30 M.R.S.A. § 6204 (Indian lands and other natural resources owned by them are subject to the laws of the State); *Couturier,* 544 A.2d at

307 (holding the Penobscot Nation is subject to the Maine Tort Claims Act when acting in a governmental capacity); *Stilphen*, 461 A.2d at 490 (holding beano games on Indian territory are not exempt from the State's licensing scheme).

The entry is

Plaintiff's Motion for Partial Summary Judgment is GRANTED.

Defendant's Motion to Dismiss is DENIED.

Defendant's Motion to Stay Proceedings is DISMISSED AS MOOT.

Plaintiff's Motion to Amend or Alter Scheduling Order is GRANTED insofar as the Defendants are required to turn over all non-privileged documents as well as logs of all documents claimed to be privileged no later than 14 days from the date of this order.

Dated at Portland, Maine this 19th day of September, 2000.

/s/ Robert E. Crowley
Robert E. Crowley
Justice, Superior Court

STATE OF MAINE CUMBERLAND, SS.	SUPERIOR COURT CIVIL ACTION DOCKET NO. CV-00-329
GREAT NORTHERN PAPER CO., et al., Plaintiffs v. PENOBSCOT NATION, et al., Defendants	DEFENDANTS' MOTION FOR RELIEF FROM DECISION AND ORDER (MEMORANDUM INCORPORATED)

Defendants, the Penobscot Nation, the Passamaquoddy Tribe, and their respective tribal chief and governors (collectively the "Tribes"), hereby move, pursuant to M.R.Civ.P. 60, for relief from this Court's Decision and Order, dated September 19, 2000 (the "Decision and Order") on the grounds that the Decision and Order reflects a misreading of the issues set forth in the Tribes' Motion to Dismiss, and, therefore, fails to adjudicate that Motion.

At page 3 of the Decision and Order, the Court characterizes the Tribes' Motion to Dismiss as making an argument "that interpretation of the phrase 'internal tribal matters' lies solely in the hands of federal courts; . . . that the state courts do not have the power to interpret this phrase." Decision and Order at 3. The Tribes never made such an argument to this Court. To the contrary, by their very Motion to Dismiss, as fully set forth in the Tribes' *Consolidated Memorandum of Law in Opposition to Plaintiffs' "Motion for Partial Summary Judgment," and in Support of Defendants' Motion to Dismiss,*

dated July 3, 2000 ("Consolidated Memorandum of Law"), the Tribes place the issue of the interpretation of that phrase before this Court. Never did the Tribes suggest that this Court lacked power to interpret the "internal tribal matters" provision; the Tribes simply pointed out that such an interpretation was a question of federal law. They therefore filed their Motion to Dismiss without prejudice to their Motion to Stay Proceedings to await a ruling from the federal court. *See* Consolidated Memorandum of Law. [Footnote Omitted]

Having cast the issues raised by the Tribes in a manner that does not reflect the Tribes' pleadings, it appears that the Court has failed to discern the fundamental points raised by the Tribes' Motion to Dismiss: (1) whether, pursuant to the Settlement Act's express prohibition against any state regulation of tribal government, the Tribes simply cannot be treated as "political subdivisions" of the State of Maine under Maine's Freedom of Access Law ("MFOAL") because the very subject matter of that law – access to governmental documents and proceedings (including the instant state court enforcement action) – constitutes *direct regulation of tribal government*, which Congress intended to protect from state interference and (2) whether MFOAL, on its face, simply cannot be construed to apply to entities other than state agencies and political subdivisions *of the State's own making*, as opposed to Indian tribes, *which are not creatures of the State*. *See* Consolidated Memorandum of Law at 3-10.

Neither of these fundamental threshold issues are addressed in the Court's Decision and Order. Since the Court did not address these fundamental issues raised in

the Tribes' Motion to Dismiss, the Court should set aside its Decision and Order and address them.

Dated: September 26, 2000 /s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.
Bar Roll No. 3301

Dated: September 26, 2000 /s/ Gregory W. Sample
Gregory W. Sample
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[September 27, 2000 Motion Denied without hearing
/s/ Robert E. Crowley]

STATE OF MAINE
Cumberland, ss.

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Cum-00-573

GREAT NORTHERN PAPER, INC., et al.,
Plaintiffs-Appellees

v.

PENOBSCOT NATION, et al.,
Defendants-Appellants

* * *

BRIEF OF APPELLANTS

* * *

SUMMARY OF ARGUMENT

[S]ection 6206(1), in accordance Congress' intent upon ratifying it, protects the Tribes' independent, self-governing authority. This means that the Tribes must be free to govern public "rights of access" to tribal governmental meetings and documents within the reservations without external regulation by the State of Maine. Those are core matters *of government* – matters that the Tribes have an exclusive right to control. State regulation of those matters would undermine the integrity of the Tribes' authority to govern themselves and their reservation property, consistent with their own values and customs, as confirmed by the clear protection afforded "internal tribal matters" under section 6206(1).

Finally, the Superior Court incorrectly applied five factors that the First Circuit has considered in order to resolve ambiguities about the scope of tribal authority

over a particular subject matter. Given the direct state regulation of the fundamental operations of government at issue here, there is no ambiguity to resolve. However, even if the Tribes' right to govern public "rights of access" to tribal documents and meeting *as an intrinsic element of tribal government* were unclear, the proper subject against which to test those factors would be that very matter: the public's "right of access" to tribal government property and meetings within the reservations, not the subject matter of a particular request "for access" by a member of the public. Application of the factors to that subject confirms that it is an "internal tribal matter."

* * *

Thus, the Superior Court's order denying the Tribes' motion to dismiss this case must be reversed.

ARGUMENT

I. Introduction and Background – The Caselaw Addressing Section 6206(1):

This case presents the issue of whether, pursuant to section 6206(1) of the Maine Implementing Act, the Penobscot Nation and the Passamaquoddy Tribe may be regulated as "political subdivisions" of the State of Maine under MFOAL. The Paper Companies, and the State of Maine, as Intervenor, assert that by virtue of the first phrase of section 6206(1), whereby the Tribes are subject to the "duties, obligations and liabilities" of Maine municipalities, they must be subject to the state regularity provisions of MFOAL. The Tribes, on the other hand,

assert that by virtue of the second phrase of this provision, which prohibits any state regulation of "internal tribal matters, including . . . tribal government," they are free from state regulation under MFOAL. As set forth below, since MFOAL is, by its very nature, regulation *of government*, the Tribes clearly are not subject to its provisions; its application to the Tribes is expressly forbidden.

* * *

Significantly, in approaching the issue, the *Akins* court said that the construction of section 6206(1) was a question of federal law. *Id.* at 485. Thus, it looked to Committee Report of the Senate Select Committee on Indian Affairs addressing the protections afforded to the Tribes under section 6206(1) as the "authoritative source" for determining the purpose of that provision. *Id.* at 489 (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984)). Like the district court, the First Circuit noted that report's reference to the Supreme Court's *Martinez* decision in stating that the Settlement Act recognized "the independent source of tribal authority, that is, the inherent authority of [the Penobscot Nation and the Passamoquoddy Tribe] to be self-governing." *Id.* at 489. The Court therefore concluded that "[g]eneral federal Indian case-law," addressing whether particular matters are free from state jurisdiction, would be useful in discerning what is, or is not, an "internal tribal matter." *Id.* at 489.

* * *

Reiterating its holding in *Akins* that the construction of section 6206(1) is a question of federal law, the *Fellencer* Court described specific legal principles that informed its approach to a construction of that provision:

> First, Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribe's sovereignty. *See* U.S. Const., art. I, § 8, cl. 3. Second, special rules of statutory construction obligate us to construe acts diminishing the sovereign rights of Indian tribes strictly, with ambiguous provisions interpreted to the Indians' benefit. These special canons of construction are employed in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence, and are rooted in the unique trust relationship between the United States and the Indians.

Penobscot Nation v. Fellencer, 164 F.3d at 709 (citations, other than to U.S. Const., art, I, § 8, cl. 3, and quotations omitted). The Court then considered the five factors set forth in *Akins* and concluded that the Nation had a protected right under section 6206(1) to resolve the employment dispute as an "internal tribal matter." *Id.* at 712-13. The court addressed the fifth *Akins* factor, "prior legal understandings" in detail. *Id.* at 711-12. As in *Akins*, the First Circuit made clear that at the time of the Settlement Act, Congress assured the Tribes that it was protecting tribal self-government in keeping with the principles of *Martinez*. . . .

[A]s set forth below, the application of MFOAL to the Tribes constitutes direct state regulation of tribal government, at its core, and this is clearly prohibited by section 6206(1). But even if there were ambiguity in this respect, the *Akins* factors, when properly applied to the matter at issue – governance of public "rights of access" to tribal government property and meetings within the Tribes'

reservations – establish that it is an "internal tribal matter" that is not subject to regulation by the State of Maine under MFOAL.

II. The Superior Court Erred in Denying the Tribes' Motion to Dismiss Because Application of MFOAL to the Tribes Constitutes Direct State Regulation of "Tribal Government" in Violation of Section 6206(1) of the Maine Implementing Act.

* * *

C. The Superior Court's Suggestion that "Tribal Government" Must be Limited to the Governance of "Cetain Areas of Particular Cultural" Importance is Erroneous.

Relying upon what appears as *dictum* in the *Stilphen* decision – that "internal tribal matters" appear to be limited to things of cultural importance to the Tribes, *see Stilphen*, 461 A.2d at 490 – the Paper Companies argued (and the Superior Court seemed to accept) the notion that "tribal government" cannot mean the basic operations of government regulated by MFOAL, but must be limited to "certain areas of particular cultural importance." App. at 37. This is wrong.

* * *

[A]n attempt to reduce "tribal government" to an amorphous cultural stereotype is directly contrary to: (1) the First Circuit's recent directive in *Fellencer* that the concept of "internal tribal matters" must be construed to promote tribal self-government, with any ambiguities resolved in favor of tribal independence, *Fellencer*, 164 F.3d at 709 (quoted *supra* p. 15); [Footnote Omitted] and

(2) Congress' express assurance to the Tribes about the operation of section 6206(1) at the time of its ratification. Congress recognized that preserving the Tribes' right to govern themselves in their own fashion was at the heart of this provision and a fundamental purpose of the Settlement Act. Through the final committee reports of the House and the Senate, Congress directly addressed concerns raised by the Tribes about the operation of section 6206(1):

> Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that *the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States.* The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory . . . , *in keeping with these decisions* the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, *by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.*

S.Rep. No. 96-957, supra. at 14; H.R.Rep. No. 96-1353 at 14-15, *reprinted in* 1980 U.S.C.C.A.N. at 3790 (emphasis

added). [Footnote Omitted] A construction that limits "tribal government" to nothing more than governance over some limited category of cultural matters is wholly inconsistent with this assurance. Again, if Maine could dictate who may attend Tribal Council meetings, how those meetings are noticed and conducted, and who may enter tribal offices to inspect and copy tribal government records, the Tribes' ability to govern themselves would be wholly undermined.

D. The Regulation of "Public Rights of Access" and other Governmental Operations Addressed by MFOAL is at the Core of "Tribal Government," Preserved for Tribal Control without State Interference.

Any doubt about whether the regulation of "public rights of access" to tribal government meetings and documents within the Tribes' reservations is the core matter of "tribal government" protected from state regulation under section 6206(1) is dispelled by the direct reference to *Santa Clara Pueblo v. Martinez* in the Senate's final committee report on the Settlement Act and the unwavering line of decisions of the Federal courts, holding that the basic principles of that case apply to the Tribes.

The Senate Report stated that under the Settlement Act, Congress recognized "*the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.*" S. Rep. No. 96-957 at 29 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)) (emphasis added). Both the House and the Senate committee reports further stated that "as Indian tribes under the United States

Constitution, [the Penobscot Nation and the Passamaquoddy Tribe] may exclude non-Indians from tribal decision-making processes." S. Rep. No. 96-957 at 15; H.R. Rep. 96-1343 at 15, *reprinted in* 1980 U.S.C.C.A.N. at 3790-91.[14]

Consistent with this clear directive from Congress, as discussed above in Section I, the federal courts consistently have made clear that the Supreme Court's holding in *Santa Clara Pueblo v. Martinez applies with full force to the Tribes. See Fellencer* 164 F.3d at 712; *Akins v. Penobscot Nation,* 130 F.3d at 486. Thus, as separate sovereigns preexisting the Constitution," the Tribes are not constrained by the constitutional provisions "framed specifically as limitations on federal or state authority." *Martinez,* 436 U.S. at 56. *Accord Akins,* 130 F.3d at 486 (citing *Martinez,* 436 U.S. at 56). The source for such rights is ICRA, *id.,* and consistent with *Martinez* and Congress' direct reference to it upon confirming the Tribes' "inherent self-governing authority," civil rights claims by Indians and non-Indians against tribal government should be

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[14] The key representative of the Executive Branch at the time of the Settlement Act, Secretary of Interior, Cecil D. Andrus stated, on the eve of enactment, that "[t]he Passamaquoddy Tribe and the Penobscot Nation will . . . not be entities created and wholly subject to State laws beyond their control, but will continue to be Indian tribal entities subject to the ultimate authority of Congress under the commerce clause of the Constitution of the United States." *Hearings Before the Select Committee on Indian Affairs, United States Senate On S. 2829 To Provide for the Settlement of the Maine Indian Land Claims,* July 1 and 2, 1980 (Washington, D.C. U.S. Government Printing Office 1980) at 37. A copy of Secretary Andrus' testimony is provided in the Addendum. Add. at 75-78.

resolved without external interference. *Id.; see Fellencer,* 164 F.3d at 712. This is because the very contours of those rights are *matters of governance* for the tribes to identify and establish out of the fibre of their unique Indian communities. *See Santa Clara Pueblo v. Martinez,* 436 U.S. at 64-65. *See also Fellencer,* 164 F.3d at 712 (describing importance of the application of this principle to the Penobscot Nation). [Footnote Omitted] If individuals' due process and equal protection rights against tribal government under the ICRA are core matters of *tribal government* for the Tribes to determine within their own forums without external interference, *see Martinez* 436 U.S. at 64-65; *Fellencer,* 164 F.3d at 712; *Akins,* 130 F.3d at 486, it is axiomatic that so-called "rights of access" for "the public" to access tribal documents and meetings within the Tribes' reservations are likewise core matters *of tribal government;* that is, "internal tribal matters" within the exclusive control of the Tribes.

The Superior Court, therefore, erred in denying the Tribes' motion to dismiss the Paper Companies' Section 409 proceeding. It constitutes state regulation of the Tribes' internal tribal matters and is prohibited as matter of law.

III. The Superior Court Erred in its Application of the Five Factors Considered by the First Circuit in *Akins v. Penobscot Nation.*

Rather than address the issue of the Tribes' right to govern public access to their internal tribal government documents and meetings without State regulation as a matter of tribal government itself, the Superior Court

focused on the subject matter of the Paper Companies' document requests to determine whether the Tribes functioned "like municipalities." App. at 37. The Court categorized all of the requests as addressing "efforts by the Tribes to regulate natural resources of the State and to obtain authority over these resources, not the inner-workings of the tribes."

[T]he issue here is simply whether the Paper Companies, as general members of the public, may enter the Tribes' reservations to access tribal government documents under MFOAL. . . . The problem presented is one of direct State regulation of basic tribal government operations within the reservations, regardless of anything the Tribes have, or have not, done. . . .

[T]he proper "matter" for consideration under the *Akins* factors must be the "matter" of governing the terms and conditions under which the general public may access tribal government documents and meetings within the reservations. If the five *Akins* factors are applied to that "matter," it is clear that it is an "internal tribal matter." It clearly involves tribal resources *within* tribal lands, the governmental documents and meetings of the Tribes on their reservations. [Footnote omitted] It clearly involves the interests of the Tribes and their members, the security of tribal property *within the reservations* and control over who may enter reservation offices. (Any alleged "rights" of non-members in this "matter" are nothing more than the asserted public "rights of access" to tribal government documents and meetings under MFOAL, itself.) The interests of the State of Maine are minimal, at best. The Attorney General of the State has disclaimed an

interest in imposing the employment discrimination provisions of the Maine Human Rights Act upon the Tribes, Op. Att'y Gen. 84-22 (July 25, 1984), notwithstanding the legislature's declaration that the Act protects "public health safety and welfare," 5 M.R.S.A. § 4552. The purpose of MFOAL is stated much less forcefully, in general public policy terms. *See* 1 M.R.S.A. § 401. [Footnote Omitted] In short, the State has no discernible interest in displacing tribal governance over the terms and conditions under which the public may access tribal documents and meetings; it is certainly far less than its expressed interest in enforcing the MHRA. Finally, under principles of federal Indian law, the "matter" would be considered within the inherent authority of a tribe to govern without external interference. Indeed, Indian tribes' exclusive authority over non-members' access to reservation property and the inner-workings of tribal government dates to the founding of the Republic. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. . . . "); *Worcester v. Georgia*, 6 Pet. 515, 561 (1832) ("the citizens of [the State] have no right to enter [tribal reservations], but with the assent of the [tribes] themselves, or in conformity with treaties, and with the acts of congress"). Thus, application of the *Akins* factors would make the relevant subject matter, "rights of access," internal tribal matters.

* * *

In *Akins*, the First Circuit warned that it is "treacherous" to make broad generalizations in approaching

issues of tribal self-government; courts must "tread cautiously" in this area. *Akins*, 130 F.3d at 487 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)). The Superior Court did not heed that warning. It mischaracterized the arguments made by the Tribes in their motion to dismiss; it made a broad, unfounded generalization that the Tribes "when acting in a governmental capacity" must be considered "political subdivisions" of Maine for the purposes of MFOAL; and it erred in its determination that the subjects of the Paper Companies' MFOAL document requests are not tribal matters.

CONCLUSION

For all of the above reasons the Superior Court's order denying the Tribes' motion to dismiss must be reversed.

Date: December 18, 2000

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STATE OF MAINE
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SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Cum-00-573

GREAT NORTHERN PAPER, INC. et al.,

Plaintiffs-Appellees

v.

PENOBSCOT NATION, et al.,

Defendants-Appellants

* * *

REPLY BRIEF OF APPELLANTS

* * *

REPLY POINTS

I. Introduction: The Issue Presented and the Consequences of a Decision Favorable to the Tribes

This is an appeal of the Superior Court's denial of the Tribes' motion to dismiss the Paper Companies' MFOAL section 409 proceedings, *see* 1 M.R.S.A. § 409 (appeals under MFOAL) for lack of subject matter jurisdiction and failure to state a claim for which relief may be granted. *See* R.Nos. 39, 41. The Tribes, in their motion to dismiss before the Superior Court and in this appeal, have made the simple claim that their control over generalized "public rights of access" to tribal documents and meetings *within* tribal governmental offices *inside* their reservations, including the terms and conditions for such access, is an "internal tribal matter" at the core of tribal self-government and, therefore, not subject to regulation by

the State of Main *under MFOAL* and, for this reason, the Companies' section 409 proceeding must be dismissed.

The outcome of this case, if favorable to the Tribes, will simply leave the Tribes in charge of the terms and conditions under which *the general public* enters their reservations to access such governmental documents and meetings. The Tribes will continue to govern those *particular* matters themselves, under their own rules and customs, without State regulation under MFOAL. . . . It will not undermine the clear grant of state authority over the Tribes under the Settlement Acts. The plaintiffs are mistaken to suggest otherwise.

II. The "Model" Promoted by the Plaintiffs is Inconsistent with the Express Provisions of the Settlement Acts and the Protection Afforded to Tribal Self-Government as Envisioned by Congress

* * *

Upon ratifying the Maine Implementing Act, Congress,[6] without any doubt, confirmed a measure of state

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[6] Under the United States Constitution, Congress has plenary authority over Indian affairs. *State v. Dana*, 404 A.2d 551, 561 (Me. 1979), *cert. denied* 444 U.S. 1098 (1980). *Accord Penobscot Nation v. Fellencer*, 164 F.3d 706, 708-09 (1st Cir. 1999), *cert. denied*, 119 S.Ct. 2367 (citing U.S. Const., art. I, § 8, cl. 3); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065-66 (1st Cir. 1978). *See also Courturier v. Penobscot Nation*, 544 A.2d 306, 307 (Me. 1988) ("subject to the control of the Congress of the United States," the Tribes possessed "the common-law immunity from suit traditionally enjoyed by sovereign powers") (citing and quoting *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064 (1st

control over the Penobscot Nation and the Passamaquoddy Tribes that establishes a truly unique structure for tribal-state relations. . . . The Tribes fully acknowledge and accept these significant compromises to their inherent right to govern many matters without state control. . . .

At the same time, however, the Settlement Acts *protected* the inherent self-governing authority of the Tribes, confirming that their "*governmental capacity*" was their own, not something "granted" and controlled by the State of Maine as the plaintiffs argue. *See State v. Mitchell*, 712 A.2d 1033, 1035 (Me. 1998) (the Passamaquoddy Tribe's authority is "independent"; it does not derive "solely from the state and federal statutes"). This is shown by the express provisions of the Settlement Act and Congress' directive upon ratifying section 6206(1) of the Maine Implementing Act.

Congress did not establish a "model," as plaintiffs suggest, under which the Tribes' "governmental capacity" is presumed to be that of a political subdivision of Maine – something of Maine's creation and regulatory control – with the exception of some narrow residuum of "tribalism." To the contrary, Congress intended to *protect* core attributes of the Tribes' inherent, self-governing authority (which clearly include control over the general

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Cir. 1979) quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Thus, Congress' intent in ratifying the terms of the Maine Implementing Act is paramount. *Fellencer*, 164 F.3d at 708-09. *See also* 25 U.S.C. § 1735(a) (federal Settlement Act controls over any conflicting construction of the Maine Implementing Act).

public's "right" to enter the reservations to access tribal government documents and meetings within the reservations) under bedrock principles of Indian law.

Express Provisions

Indeed, Congress expressly confirmed the "criminal and civil jurisdiction," of the Tribes, "separate and distinct from" that of the State of Maine, 25 U.S.C. § 1725(f). It provided that they would manage and administer their lands and natural resources in accordance [sic] federal funding contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et. seq.* 25 U.S.C. § 1724(h). [Footnote Omitted] It consented to the Tribes and the State of Maine reaching future agreements, without its oversight or ratification, to address "(A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State *within their respective jurisdictions;* (B) the allocation or determination of *governmental responsibility* of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between the tribal courts and State courts. 25 U.S.C. § 1725(e)(1) (emphasis added). Further, it offered each tribe the opportunity to establish, and file with the Secretary of the Interior, an "organic governing document" to "govern" the respective tribe when "acting in its *governmental capacity.*" 25 U.S.C. § 1726(a) (emphasis added).

Clearly, given these express provisions of the Settlement Act, Congress confirmed the "governmental capacity" of the Tribes *as their own*, not as something derived from, and controlled by, the State of Maine. *See also State v. Mitchell*, 712 A.2d at 1035 & n.5 (Tribes' agreement to adopt certain state laws as their own in criminal cases did not "violate the principles of separate sovereignty") (citing to S. Rep. No. 96-957). Plaintiffs' "model" is directly contrary to these express provisions enacted by Congress. [Footnote Omitted]

Congress' Directive upon Ratifying Section 6206(1)

It is also contrary to Congress' clear directive upon ratifying section 6206(1). Through the final committee reports of both the House and the Senate, Congress assured the Tribes that the protection from state regulation under section 6206(1) was "in keeping with" the principles of *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979). *See* S.Rep. No. 96-957 at 14 (Add. at 59) [Footnote Omitted]; H.R.Rep. No. 96-1353 at 14-15, *reprinted in* 1980 U.S.C.C.A.N. at 3790. *Accord Penobscot Nation v. Fellencer*, 164 F.3d at 708, 712. [Footnote Omitted]

In *Bottomly*, a unanimous panel of the First Circuit, in an opinion written by Chief Judge Frank M. Coffin, admonished the State for its "misconceive[d]" assertion that, in contrast to the "fierce warring tribes of the frontier," Maine's historic domination of the Tribes had destroyed their independent self-governing authority (or

"sovereignty"). *Id.* at 1065-66.[11] The court pointed out that the State's analysis would "condition the exercise of an aspect of sovereignty" – in that case, the Passamaquoddy Tribe's inherent sovereign immunity from suit – "on a showing that it had been granted to the tribe by the federal government." *Id.* at 1065. The First Circuit explained, however, that

> the proper analysis is just the reverse: The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty, which has never extinguished,*" F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). . . . Indian tribes are, of course, no longer possessed of the full attributes of sovereignty. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at

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[11] The State's argument was "not unfamiliar" to the First Circuit because it had been previously asserted in the context of *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). *Bottomly*, 599 F.2d at 1064. In *Morton*, the State argued that the Passamaquoddy Tribe could not be considered a "real" Indian tribe. *See Morton*, 528 F.2d at 380. It relied heavily upon this Court's decision in *State v. Newell*, 84 Me. 465 (1892). *See Morton*, 528 F.2d at 380. In *Newell*, this Court held that the Passamaquoddy Tribe could not be considered a bona fide Indian tribe, stating "these Indians cannot make war or peace [and] are as completely subject to the State as any other inhabitants can be." *Id.* at 468. This echoed an earlier decision in which this Court said "imbecility on their [the Indians'] part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man." *Murch v. Tomer*, 21 Me. 535, 538 (1842). In light of *Morton* and *Bottomly*, this Court, in *State v. Dana*, 404 A.2d at 559-61, withdrew from these early views of the Tribes.

> the sufferance of Congress and is subject to complete defeasance. But *until Congress acts, the tribes retain their existing sovereign powers.*

Bottomly, 599 F.2d at 1065-66 (citation omitted) (emphasis in last sentence added).

By clarifying, through its final committee reports, that the prohibition against state regulation of the Tribes' internal tribal matters would be "in keeping" with *Bottomly*, "Congress signaled its intent that federal Indian common law would give meaning" to that provision. *Fellencer*, 164 F.3d at 712. Indeed, both congressional reports expressly acknowledged the *Bottomly* Court's holding that the Tribes *"possess inherent soveriengty to the same extent as other tribes in the United States"* and are *"entitled to protection under the federal Indian common law doctrines."* S.Rep. No. 96-957 at 13-14 (Add. at 58-59); H.R.Rep. No. 96-1353 at 13-14, *reprinted in* 1980 U.S.C.C.A.N. at 3790-91 (emphasis added). Congress "explicitly made existing general federal Indian law applicable" to the Tribes. *Fellencer*, 164 F.3d at 712 (quoting and citing *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997)).

Bedrock Principles Protecting the Tribes' Self-Governing Authority

Thus, two bedrock principles of law fully apply to *protect* the inherent self-governing authority of the Penobscot Nation and the Passamaquoddy Tribe "as distinct, independent, *political* communities," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)) (emphasis

added). First, the Tribes retain all attributes of their inherent authority not expressly divested by Congress. *Worcester*, 31 U.S (6 Pet.) at 559; *Bottomly*, 599 F.2d at 1065; *see Courturier v. Penobscot Nation*, 544 A.2d at 307 (citing *Bottomly* and *Martinez*). Second, and as a direct corollary of the first principle, any ambiguities in federal statutes or treaties affecting that inherent authority must be strictly construed in favor of the Tribes; that is, in favor of tribal independence of self-government. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Fellencer*, 164 F.3d at 709; *see also Akins*, 130 F.3d at 489 (where Congress is silent, court will not infer interference with "inherent self-governing authority of a tribe").[12]

The Plaintiffs' view that the municipal "duties and obligations" language in section 6206(1) establishes a presumption that the Tribes, in their "governmental capacity," function as political subdivisions of the State, sweeps away the protection that Congress intended to afford tribal self-government upon ratifying the "internal tribal matters" provision of section 6206(1). Plaintiffs' "model" is nothing other than a restatement of the State's "misconceive[d]" position in *Bottomly*. The First Circuit rejected it, and Congress clearly intended to protect against it. [Footnote Omitted]

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[12] The canon of construction that ambiguities in statutes affecting Indian tribes must be construed in favor of the tribes is "deeply rooted in" jurisprudence of this country. *County of Yakima v. Yakima Nation*, 502 U.S. 251, 269 (1992). The Supreme Court describes it as "eminently sound and vital." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

Summary: The "Model" Envisioned By Congress Protects the Right of the Tribes to Control the Subject Matter of MFOAL Without Interference by the State.

Certainly, as set forth above, Congress divested the Tribes of numerous attributes of their self-governing authority and subjected them to a significant measure of state control. At the same time, however, it affirmatively protected the Tribes from state regulation of tribal governmental matters, recognizing, in keeping with *Bottomly*, that those attributes of their sovereignty, not expressly divested, would remain in place.

As discussed in their principal brief at pp. 25, 28-29, the Tribes' right to govern the terms and conditions *for the general public* to enter their reservations to access, inspect and copy tribal governmental documents or attend the meetings of their Tribal Councils is an intrinsic attribute of their inherent, self-governing authority. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. . . . ") (emphasis in original). *Accord New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established.") . . .

Contrary to Plaintiffs' paradigm, Congress preserved the right of the Tribes to control this fundamental matter of *tribal government* without state interference upon ratifying section 6206(1)'s prohibition against state regulation of the Tribes' "internal tribal matters." The Tribes'

assumption of the "duties" and "obligations" of Maine municipalities simply cannot be read to render their authority over this core governmental matter subject to state regulation. Even if there were ambiguity about this, it would be resolved to protect Tribes' own governance of this matter in accordance with Congress' directive in ratifying section 6206(1). *See Montana*, 471 U.S. at 766; *Fellencer*, 164 F.3d at 709.[15]

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[15] The Paper Companies rely heavily upon this Court's decision in *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983), *appeal dismissed*, 464 U.S. 963 (1983) to support their "model." As the Tribes made clear in their principal brief, however, the *Stilphen* Court's view that direct state regulation of tribal governmental matters is prohibited under section 6206(1) fully pertains in the instant case, rendering MFOAL inapplicable to the Tribes. To the extent that the *Stilphen* decision suggests otherwise, it should be distinguished. . . . Certainly, this Court's conclusion, in *Stilphen*, that the protection against state regulation of "internal tribal matters" cannot turn on principles of federal Indian law is contrary to the First Circuit's decisions in *Akins* and *Fellencer* and should, therefore, be re-examined. . . . Likewise, insofar as this Court considers its statement in *Stilphen* that the protection afforded to "internal tribal matters" concerns only matters of "unique cultural importance" to be *a holding*, rather than *dictum*, it should likewise re-examine that view in light of the First Circuit's pronouncement, in *Akins*, that "[s]uch broad themes do not help to define the rules of decision in these cases." *Akins v. Penobscot Nation*, 130 F.3d at 487. This court has not hesitated, in the past to reconsider its views on Indian affairs in light of First Circuit law. *See supra* note 11.

III. Preservation of the Tribes' Governance of the Subject Matter of MFOAL – "Public Access" to the Tribes' Documents and Governmental Meetings Within the Reservations – as a Matter of Tribal Government is Fully Consistent with the Caselaw

Under their mistaken "model," presuming the Tribes to "function" in their "governmental capacity" as political subdivisions of the State of Maine unless they act on something uniquely "Indian" in nature, the State and the Paper Companies take offense at the Tribes' argument that the "internal tribal matters" provision protects their own governance of the subject matter of MFOAL ("public access" to documents and meetings within their reservations) free from any state regulation under that statute. They insist, instead, that the Tribes' right to govern any subject other than something "uniquely Indian in character" without state interference must turn on the facts of each particular case: that is, upon a showing by the Tribes that "something uniquely 'Indian' " is at stake.

Plaintiffs fail to understand that the very right to be self-governing is "uniquely Indian." *See Merrion*, 455 U.S. at 140; *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55, 71-72; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). Thus, the Tribes are not subject to *entire* constitutional provisions and other laws generally applicable to Maine's political subdivisions *because their exclusive self-governing authority is intact and protected from dissolution.* For example, the Tribes are not subject to claims by individuals under the provisions of the Constitution that constrain the authority of Maine's political subdivisions, the Bill of Rights and the Fourteenth Amendment, *precisely because the Tribes are separate sovereigns, pre-dating the*

Constitution. See Akins, 130 F.3d at 486 (citing *Martinez*, 436 U.S. at 56). While such claims may [sic] brought against the Tribes under ICRA, *id.*; *Fellencer*, 164 F.3d at 712, the Tribes are free from external interference in their resolution of those claims *precisely because they implicate the identity of the Tribes as culturally distinct, self-governing sovereign governments. See Santa Clara Pueblo v. Martinez*, 436 U.S. at 64-65; *Fellencer*, 164 F.3d at 712. Nor are the Tribes subject to certain employment discrimination laws, *see, e.g.*, 42 U.S.C. § 2000e(b) (exclusion of Indian tribes from Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 1211(5)(B)(i) (exclusion of Indian tribes from employment provisions of Americans with Disabilities Act), *precisely because the Tribes' right to manage such employment issues is a unique matter of tribal self-government. See Morton v. Mancari*, 417 U.S. 535, 548 (1974); *Fellencer*, 164 F.3d at 711; *Florida Paraplegic Assn. v. Miccosukee Tribe*, 166 F.3d 1126, 1334 (11th Cir. 1999). In short, the Tribes are exempt from these laws *in toto* because regulation of the subject matter from the outside would infringe upon core matters of *tribal* government.

The entire subject matter of MFOAL (the governance of general "public rights of access") is just as much (if not more) at the core of the Tribes' fundamental right to govern themselves as the above-referenced constitutional and civil rights laws. Certainly, there can be no dispute that section 6206(1) prohibits the application of *entire* provisions of Maine law governing Maine's political subdivisions (e.g., 30-A M.R.S.A. § 2501-2555 (governing charters, initiatives, elections, and meetings)). Similarly, where the imposition of external regulatory authority would clearly displace well-established, core matters of

tribal self-government, as in the case of MFOAL, the Tribes must be free to maintain the integrity of their own authority as *tribal governments* under the prohibition established by section 6206(1).[16]

* * *

[16] Obviously, a mere attempt to govern a matter by the Tribes will not render it free from state jurisdiction as an "internal tribal matter." That would run afoul of the express provisions of the Settlement Acts delineated above, and it is not the law. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (describing two barriers to state authority over Indian tribes: the "infringement" test, prohibiting direct infringement upon core matters of tribal self-government and hybrid federal "preemption" test, weighing state and tribal interests). Without an express divestiture by Congress, however, tribal autonomy from external authority that would infringe upon the established right of tribes to govern core matters affecting their members and reservation has never been doubted, *see Martinez*, 436 U.S. at 55; *United States v. Mazurie*, 419 U.S. 544, 557 (1975), and that is clearly the case with respect to the terms and conditions under which the general public may enter Indian reservations to access the governmental documents and meetings of the Tribes. *See Merrion*, 455 U.S. at 144; *Mescalero Apache Tribe*, 462 U.S. at 333. In situations where it is not clear that such a direct infringement of "tribal government" is at stake, it surely makes sense to balance competing interests, as the First Circuit did in *Akins*, determine whether state authority is prohibited under section 6206(1). *Accord Mescalero Apache Tribe*, 462 U.S. at 334 (describing preemption test). As the Tribes explained in their principal brief, the *Akins* factors, when properly applied to the "matter" at hand – public access to tribal documents and meetings within the reservations – establish, beyond any doubt, that it is an "internal tribal matter."

CONCLUSION

For all of the above reasons, together with those set forth in the Tribes' principal brief, the Superior Court's denial of the Tribes' motion to dismiss must be reversed.

Date: January 25, 2001 /s/ Kaighn Smith, Jr.

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STATE OF MAINE CUMBERLAND, SS.	SUPREME JUDICIAL COURT Sitting as the Law Court DOCKET NO. CUM-00-573
GREAT NORTHERN PAPER CO., et al., Plaintiffs-Appellees v. PENOBSCOT NATION, et al., Defendants-Appellants	DEFENDANTS' MOTION FOR RECONSIDERATION

The Defendants, the Penobscot Nation, the Passamaquoddy Tribe, and their respective Governors (collectively the "Tribes") hereby respectfully move the Court for reconsideration. This motion is made pursuant to Rule 76A of the Maine Rules of Civil Procedure.

POINTS FOR RECONSIDERATION

The Tribes ask the Court to reconsider its decision for the following reasons:

A. The decision misapprehends the Tribes' appeal by stating that "the Tribes do not contend that the Superior court lacked subject matter jurisdiction" over the Plaintiffs' action. *See Great Northern Paper, Inc. v. Penobscot Nation*, No. Cum-00-573, slip. op. at 5 n.3 (Me. May 1, 2001) hereinafter referred to as "Slip. Op."). As set forth

> below, the Tribes plainly have not abandoned the claim of lack of subject matter jurisdiction, which is presented in the instant case. . . .

DISCUSSION

A. ***The Tribes have Not Abandoned their Claim of Lack of Subject Matter Jurisdiction, but Because that Issue Turns Solely on a Question of Federal Law, this Court Should Defer Decision to Await Disposition of the Federal Case in Which the Federal Question is Presented.***

In its decision, after stating that the Tribes moved to dismiss the action of Plaintiffs Great Northern Paper, Inc., Georgia-Pacific Corporation, and Champion International Corporation ("Plaintiffs" or the "Companies") under Maine's Freedom of Access Laws, 1 M.R.S.A. §§ 401-410 ("MFOAL") on the grounds that the Superior Court lacked subject matter jurisdiction and that MFOAL could not, as a matter of law, be invoked against the Tribes, the Court notes:

> Before us, the Tribes do not contend that the Superior court lacked subject mater jurisdiction. We take judicial notice of the Tribes' action in the United States federal district court seeking to enjoin the paper companies from invoking the Freedom of Access Act against them. *See Penobscot Nation v. Georgia-Pacific Corp.*, 116 F. Supp.2d 201 (D.Me.2000).

Slip. Op. at 5 n.3. This is inaccurate. While there were two parts to the Tribes' motion to dismiss, subject matter

jurisdiction and failure to state a claim, *see* Record No. 26, the Tribes never intended to abandon the first, and have not done so.

. . . [B]y addressing only the "failure to state a claim" issue, this Court failed to address the Tribes' asserted right to be free from state authority under MFOAL on the grounds that the very "matter" at issue – governance of the rights of the general public to enter tribal offices within the reservations to inspect and copy the Tribes' documents – is in "internal tribal matter." *See Brief of Appellants* at 20-25; *Reply Brief of Appellants* at 16-18. This issue surely implicates subject matter jurisdiction. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 713 (1st Cir. 1999) (directing district court to issue injunction against state court plaintiff because tribe not "subject to state court jurisdiction" over the matter of civil rights claims by a former tribal employee).

Indeed, prior to Congress' enactment of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (the "Settlement Act"), it was established, as a matter of federal law, that the Tribes had inherent sovereign immunity from suit. *See Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979). Only Congress or the Tribes, themselves, have authority to waive that sovereign immunity. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueble v. Martinez*, 436 U.S. 49, 58 (1978). Congress waived the Tribes' sovereign immunity from suit in state court pursuant to 25 U.S.C. 1725(d)(1), but not with respect to "internal tribal matters." *See* S. Rep. No. 96-957 at 19 (waiver of sovereign immunity "subject to the limitation on internal affairs contained in Sec. 6206(1)"); H.R. Rep.

No. 96-1353 at 19, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3795 (same). Thus, there can be no doubt that the Tribes' claimed immunity from the Companies' MFOAL action is a question of subject matter jurisdiction, governed solely by Congress' intent. *See Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-73 (1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).[3] Furthermore, any ambiguity about the scope of Congress' limitation on its waiver of the Tribes' sovereign immunity with respect to "internal tribal matters" must be strictly resolved in favor of the Tribes. *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1285 (11th Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).

This important question of federal law is intimately bound-up with the Tribes' claim, in *Georgia-Pacific Corp.*, that they have an affirmative federal right to govern public access to their reservations without state interference as an "internal tribal matter." The issue turns on Congress' understanding of "internal tribal matters." *See Penobscot Nation v. Fellencer*, 164 F.3d at 709; *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997). If the Tribes prevail in their appeal before the First Circuit, their

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[3] The scope of the Tribes' sovereign immunity cannot possibly turn on a question of state law. Their sovereign immunity pre-dates the founding of the Republic, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d at 1065, and, under the Constitution, can only be divested by Congress, *id.* at 1066. A delegation of that authority to a state would violate Congress' plenary authority over Indian affairs under the Constitution. *See* U.S. Const. art I, § 8, cl. 3.

right to have that question of federal law decided by the federal court will be confirmed. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party to choose a Federal court where there is a choice cannot properly be denied.") (quotations and citation omitted).

Thus, as a matter of comity, this court should defer decision on this question of federal law to await final disposition of *Georgia-Pacific Corp.*, and if the First Circuit directs the district court to decide the case, defer to the federal court's final disposition of the Tribes' claims. *See Rickey Land & Co. v. Miller & Lux*, 218 U.S. 258, 262 (1910) (court first seised with jurisdiction should proceed to determination of the questions "without interference"); *TPM Hollings, Inc. v. Intra-Gold Industries, Inc.*, 91 F.3d 1, 4 (1st Cir. 1996) (as a matter of comity, "the usual practice is for the court that first had jurisdiction to resolve the issues and the other court to defer"). [Footnote omitted] If, however, the Court proceeds to determine the question without deference to the federal court, it should order rebriefing because the issue of subject matter jurisdiction is clearly presented and the Court's holding that the Tribes' relationship to the state, in terms of their sovereign immunity, is that a "municipality," *see* Slip. op. at 19 (describing Tribes' sovereign immunity as that of "other cities and towns"), is contrary to law. *See Bottomly*, 599 F.2d at 1065-66. *See also supra* note 3.

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Dated: May 15, 2001

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